Last Updated January 30, 2017

CH. 32
JURY

Top

§32-1
Right to Jury Trial

(**NOTE**: Under Illinois law (Ill.Const. art. I, §§8 & 13 and 725 ILCS 5/103-6), an accused in a criminal prosecution has the right to a trial by jury. The prosecution does not have the right to a jury trial — the defendant's right to a jury trial includes the right to waive a jury over the objection of the State. **People ex rel. Daley v. Joyce**, 126 Ill.2d 209, 533 N.E.2d 873 (1988).

Codispoti v. Pennsylvania, 418 U.S. 506, 94 S.Ct. 2687, 41 L.Ed.2d 912 (1974) A defendant has a right to trial by jury for all "serious" offenses. Crimes carrying a sentence of more than six months are deemed to be "serious" and those carrying a sentence of six months or less are "petty." See also, **Lewis v. U.S.**, 518 U.S. 322, 116 S.Ct. 2163, 135 L.Ed.2d 590 (1996) (defendant charged with multiple petty offenses is not entitled to jury trial even though aggregate maximum sentence exceeds six months.)

Blanton v. North Las Vegas, 489 U.S. 538, 109 S. Ct. 1289, 103 L.Ed.2d 550 (1989) A DUI prosecution which carried a maximum sentence of six months imprisonment did not require a jury trial even though additional, non-imprisonment penalties could be imposed (i.e. community service, a fine, loss of driver's license and mandatory attendance at alcohol abuse courses).

McKeiver v. Pennsylvania, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971) A jury trial is not required in juvenile proceedings.

Shillitani v. U.S., 384 U.S. 364, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966) There is no right to a jury trial for civil contempt based on refusing to testify before a grand jury. See also, **Frank v. U.S.**, 395 U.S. 147, 89 S.Ct. 1503, 23 L.Ed.2d 162 (1969).

U.S. v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968) Statute which allows death penalty only on defendants who assert their right to a jury trial is unconstitutional.

Danville v. Hartshorn, 53 Ill.2d 399, 292 N.E.2d 382 (1973) The trial court erred by rejecting defendant's demand for jury trial in a prosecution for violating a municipal ordinance.

People v. Ruiz, 94 Ill.2d 245, 447 N.E.2d 148 (1982) Defendant and a co-defendant were granted a severance because certain statements made by the co-defendant implicated the defendant. The trial was conducted by a single judge, but with two juries. Evidence admissible against both defendants was heard by both juries, but one jury was excused when evidence admissible against only the other defendant was presented. The Court held that simultaneous trials before two juries was not error. Although this procedure presents the "possibility for prejudicial error resulting from confusion at trial," no such confusion occurred in this case.

People v. Hudson, 157 Ill.2d 401, 626 N.E.2d 161 (1993) A jury consists of all its members, including alternates. Therefore, no abuse of discretion occurred by excusing a juror who was going

to be absent and replacing him with an alternate, despite the statutory requirement that the death penalty hearing occur before the same "jury" that determined defendant's guilt.

People ex rel. O'Malley v. 6323 North LaCrosse Avenue, 158 Ill.2d 453, 634 N.E.2d 753 (1994) The right to a jury trial exists at forfeiture hearings under the Illinois Controlled Substances and Cannabis Control Act. Article I, §13 of the Illinois Constitution states that the "right of trial by jury as heretofore enjoyed shall remain inviolate," and the right to trial by jury for *in rem* proceedings existed and was recognized when the Constitution was adopted.

People v. Hayes, 319 Ill.App.3d 810, 745 N.E.2d 31 (5th Dist. 2001) Supreme Court Rule 434(e) and 725 ILCS 5/115-4(g) provide that an alternate juror may be placed on the jury if "before the final submission of a cause a member of the jury dies or is discharged." Although it was "irregular" to replace a juror with an alternate where during deliberations it became clear that the juror had trouble understanding English, defendant was not prejudiced where the alternate had been subjected to the same selection procedures as the other jurors, took the same oath, heard the evidence, was instructed on the law, was discharged for only a short period of time, and stated that he had not discussed the case or formed any opinions. In addition, the jury was admonished to begin deliberations "all over again." The court stressed, however, that the same procedure would not necessarily be proper in other situations. "Ideally, the trial court should ask the defendant whether he would waive his right to a jury of 12 so that deliberations can proceed with 11 jurors." In other circumstances, a mistrial might be required.

People v. Matthews, 304 Ill.App.3d 415, 710 N.E.2d 524 (5th Dist. 1999) Although a six-person jury meets constitutional requirements, the right to a 12-person jury is an "essential feature" of the constitutional right to a jury trial. Because nothing in the record indicated that defendant agreed to a jury of less than 12 members or acquiesced in a six-person jury, it could not be assumed that he was fully informed of his right to a 12-person jury and voluntarily waived that right.

Cumulative Digest Case Summaries **§32-1**

In re Jonathan C.B., ___ Ill.2d ___, ___ N.E.2d ___ (2011) (No. 107750, 6/30/11)

705 ILCS 405/5-101(3) authorizes jury trials in delinquency proceedings only if the minor is tried under the extended juvenile jurisdiction provision, as a habitual juvenile offender, or as a violent juvenile offender. Here, a minor charged with delinquency for a sex offense argued that he was constitutionally entitled to a jury trial.

A. The court rejected the argument that because amendments to the Juvenile Court Act have made delinquency proceedings equivalent to criminal prosecutions, a minor is entitled to a jury trial under the Illinois constitution. The court acknowledged that under recent amendments to the Juvenile Court Act, punishment and protection of the public are included within the purposes of juvenile delinquency proceedings. The court found, however, that rehabilitation remains a more important consideration in juvenile proceedings than in the criminal justice system. The court also noted that it has repeatedly found that delinquency proceedings are not the equivalent of criminal prosecutions, and declined to overrule such precedent.

The court also observed that although minors found delinquent based on sex offenses face

some of the same collateral consequences as adult offenders, such as the requirement to submit DNA samples and the absence of confidentiality of court records, such collateral consequences do not equate a juvenile delinquency determination with an adult criminal conviction.

B. For similar reasons, the court rejected the argument that because minors accused of sex offenses are subject to more serious sanctions than other delinquent minors, they are entitled to jury trials as a matter of due process and equal protection under the Illinois and federal constitutions. The court acknowledged that minors accused of sex offenses are denied the benefit of confidentiality of court records, but noted that such minors have a diminished expectation of privacy. The court also noted that the lack of confidentiality and collateral consequences such as the requirement to submit DNA samples and ineligibility for expungement are related to rehabilitation because such measures identify persons who are at risk for recidivism.

Furthermore, delinquency adjudications for felony sex offense carry only indeterminate juvenile sentences and not more serious adult sentences. Finally, the court reiterated precedent that sex offender registration is a public safety measure rather than a punishment mandating the right to a jury trial, and found that in any event juvenile offender registration is less onerous than adult registration because the information is available to a smaller group of persons and juveniles may petition to terminate the registration requirement.

In rejecting defendant's argument, the court also found that accepting the argument would offend *stare decisis* by overruling long-standing precedent concerning the nature of juvenile delinquency proceedings. The minor "has failed to provide this court with good cause or compelling reasons to depart from our prior decisions."

C. The Court rejected the argument that because minors adjudicated delinquent of sex offenses are similarly situated to persons who have the right to a jury trial under extended juvenile jurisdiction and as adult offenders, the absence of the right to a jury trial in sex offense delinquency proceedings violates equal protection. The equal protection clause prohibits disparate treatment of similarly situated individuals. Unless fundamental rights are at issue, equal protection challenges are resolved under the "rational basis" test, which considers whether the challenged classification bears a rational relationship to a legitimate governmental purpose.

The court concluded that minors adjudicated delinquent for sex offenses cannot meet the threshold requirement of showing that they are similarly situated to juveniles subjected to extended juvenile jurisdiction prosecutions or to adult sex offenders. Minors found delinquent under extended juvenile jurisdiction and adult sex offenders both face severe deprivations of liberty, including mandatory incarceration and adult sentences. By contrast, a minor adjudicated delinquent for a sex offense does not face the possibility of an adult criminal sentence, and instead receives a sentence that automatically terminates at age 21.

The court also found that equal protection principles are not triggered because juvenile sex offenders may face a future loss of liberty under the Sexually Violent Persons Act; commitment under the Act requires a separate, successful action by the State and proof of additional elements that are not common to all sex offenses.

Defendant's adjudications for criminal sexual assault and attempt robbery were affirmed.

(Defendant was represented by Assistant Defender Catherine Hart, Springfield.)

People ex rel. Birkett v. Dockery, 235 Ill.2d 73, 919 N.E.2d 311 (2009)

1. 725 ILCS 5/115-4(b) provides that where a defendant elects a trial by jury, the jury "shall

consist of 12 members." Because a defendant can waive the entire right to trial by jury, however, he or she can also waive the constitutional right to a jury panel composed of 12 members. Thus, while a defendant does not have an absolute right to a jury of less than 12, he or she may request that the trial court, in its discretion, order such a jury in a particular case.

Because the trial court has discretion to decide whether to use a six-person jury, *mandamus* does not lie to preclude use of a jury of less than 12.

2. The court rejected the State's argument that a jury of less than 12 is authorized only where the State and defendant agree to the procedure. Instead, the court accepted defendant's argument that "[n]either the statute nor case law supports the State's position that it wields absolute veto power over a defendant's request to proceed with fewer than 12 jurors."

3. In the course of its opinion, the court noted that the Illinois constitutional right to a jury trial is broader than the equivalent right under the Federal Constitution. Thus, while the federal constitution allows a defendant's jury waiver to be subject to the approval of the prosecution, the Illinois constitution affords the right to a jury trial solely to the defendant, and not to the prosecution.

People v. Nelson, 235 Ill.2d 386, ___ N.E.2d ___ (2009) (No. 105340, 12/17/09)

Where the State grants a defendant the right to have a jury determine punishment, the defendant acquires a due process interest in having the jury determine his sentence. The trial court does have discretion to discharge a juror after deliberations have begun, however, where such action is appropriate.

Here, the trial judge erred by dismissing a juror during deliberations at the death penalty stage of the proceedings. (See **DEATH PENALTY**, Ch. 14).

(Defendant was represented by Assistant Defender Steve Clark, Supreme Court Unit.)

Top

§32-2
Number of Jurors - Unanimous Verdicts

Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) The federal constitution does not require that the jury verdict in a criminal case be unanimous.

Ballew v. Georgia, 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978) A six-person jury does not violate the right to a jury trial under the Sixth and Fourteenth Amendments. However, the purpose and functioning of a jury in a criminal trial is seriously impaired, to a constitutional degree, when the size of a jury is reduced to less than six members. See also, **Burch v. Louisiana**, 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979) where the defendant was deprived of his right to a trial by jury where he was convicted of a non-petty offense by a non-unanimous, six-member jury.

People v. Patton, 105 Ill.App.3d 892, 435 N.E.2d 171 (1st Dist. 1982) The court may accept a verdict on one count though the jury cannot reach a unanimous decision on remaining counts.

People v. Burries, 144 Ill.App.3d 138, 494 N.E.2d 750 (4th Dist. 1986) During the State's case,

a juror informed the judge that she could not be fair. The judge allowed defense counsel's motion to have the juror withdrawn. Defense counsel then requested a mistrial, stating that he was unwilling to proceed with 11 jurors. The judge asked the defendant, who said that he wanted to proceed with 11 jurors. The Court held that the right to waive a full complement of jurors lies with the defendant himself, not with defense counsel stating that, "if a defendant has the authority to waive a jury trial altogether against advice of counsel, logic requires that he have the authority to waive the existence of a full twelve-person jury under similar circumstances."

People v. Babbington, 286 Ill.App.3d 724, 676 N.E.2d 1326 (1st Dist. 1997) Defendant was denied his right to a fair trial by an alternate juror's participation in the deliberations, either as a replacement for one of the regular jurors or as a 13th juror. It was clear that the alternate participated in the deliberations, since she signed the verdict forms and responded to the judge's polling.

People ex rel. Birkett v. Dockery, 235 Ill.2d 73, 919 N.E.2d 311 (2009)

1. 725 ILCS 5/115-4(b) provides that where a defendant elects a trial by jury, the jury "shall consist of 12 members." Because a defendant can waive the entire right to trial by jury, however, he or she can also waive the constitutional right to a jury panel composed of 12 members. Thus, while a defendant does not have an absolute right to a jury of less than 12, he or she may request that the trial court, in its discretion, order such a jury in a particular case.

Because the trial court has discretion to decide whether to use a six-person jury, *mandamus* does not lie to preclude use of a jury of less than 12.

2. The court rejected the State's argument that a jury of less than 12 is authorized only where the State and defendant agree to the procedure. Instead, the court accepted defendant's argument that "[n]either the statute nor case law supports the State's position that it wields absolute veto power over a defendant's request to proceed with fewer than 12 jurors."

3. In the course of its opinion, the court noted that the Illinois constitutional right to a jury trial is broader than the equivalent right under the Federal Constitution. Thus, while the federal constitution allows a defendant's jury waiver to be subject to the approval of the prosecution, the Illinois constitution affords the right to a jury trial solely to the defendant, and not to the prosecution.

People v. Dereadt, 2013 IL App (2d) 120323 (No. 2-12-0323, 9/30/13)

1. Under 725 ILCS 5/115-4(b), a jury consists of 12 members. Illinois law does not necessarily require a 12-person jury, however, because the right to waive a jury trial entirely necessarily includes the right to waive a jury composed of 12 members. Thus, Illinois courts have consistently held that a criminal defendant may waive a 12-member jury and proceed with a jury of fewer members.

2. Generally, defense counsel's oral waiver of the right to a jury trial is valid where the defendant is present and fails to object. The court rejected the argument that a personal waiver by the defendant was required in order to proceed with a six-person jury, finding that the waiver of a 12-person jury was valid where defense counsel stated in defendant's presence that she had spoken with defendant about whether he wanted a jury of six members or 12 members and that defendant wanted a jury of six.

(Defendant was represented by Assistant Defender Paul Glaser, Elgin.)

People v. Dixon, 409 Ill.App.3d 915, 948 N.E.2d 786 (1st Dist. 2011)

1. Under **People v. Babbington**, 286 Ill.App.3d 724, 676 N.E.2d 1326 (1st Dist. 1997), participation by an alternate juror in jury deliberations constitutes plain error which causes substantial prejudice to the defendant. In **Babbington**, the alternate juror deliberated with the jury, stayed overnight in the same hotel as the sequestered jurors, signed the verdict forms, and responded when the jury was polled.

The court concluded that defendant's post-conviction petition failed to assert the gist of a meritorious issue under **Babbington** because it was not apparent that the alternate juror participated in deliberations. Instead, the record rebutted defendant's claim because the four verdict forms bore only the signatures of the 12 jurors, the alternate jurors had been instructed to remain in the courtroom when the jury retired to deliberate, and the only reason to believe that an alternate juror deliberated was the clerk's erroneous polling of an alternate. The court noted that the clerk apparently realized the mistake and did not complete the polling question, but the alternate juror answered "yes" when asked whether "this [was] your verdict." In view of the verdict forms with 12 signatures, the court concluded that the alternate's answer likely reflected only that he agreed with the verdict reached by the jury and not that he had participated in deliberations.

2. Furthermore, the post-conviction petition did not present the gist of a meritorious issue that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness for failing to peremptorily challenge to excuse a prospective juror who eventually became the jury's foreperson. The trial court had refused to excuse the juror for cause after he failed to mention two 20-year-old arrests when asked about his prior arrest record.

The court concluded that the defendant could not show prejudice because, in light of the overwhelming evidence of guilt, there was no reasonable probability that the defendant would have been acquitted had the foreman not been part of the jury. Because defendant could not show that trial counsel was ineffective, appellate counsel's failure to raise the issue on direct appeal was not error.

The court also noted that the juror's failure to mention two 20-year-old arrests did not indicate any bias where the juror stated during *voir dire* that he could be objective although one of his sons was incarcerated at the time of the trial.

(Defendant was represented by Assistant Defender Rebecca Levy, Chicago.)

Top

§32-3
Waiver of Jury

§32-3(a)
Generally

People ex rel. Daley v. Joyce, 126 Ill.2d 209, 533 N.E.2d 873 (1988) Under the Illinois Constitution, a defendant has the right to waive a jury trial even over the State's objection.

People v. Scott, 186 Ill.2d 283, 710 N.E.2d 833 (1999) Under 725 ILCS 5/103-6, a bench trial may be held if the right to a jury trial is "understandably waived by defendant in open court." Under 725

ILCS 5/115-1, a waiver of a jury trial should be in writing. Under **People v. Tooles**, 177 Ill.2d 462, 687 N.E.2d 48 (1997), the absence of a written jury waiver does not require reversal "so long as the defendant's waiver was made understandingly." Here a jury waiver form that defendant executed in his attorney's office was insufficient where it was filed in the defendant's absence and never discussed while he was in court. Defense counsel's references to a bench trial on the day of trial did not constitute defendant's acknowledgment of the waiver in open court - defendant was not in court when a jury waiver was discussed, the written jury waiver indicated that defendant could withdraw the waiver and defense counsel's remarks were not "an affirmative waiver" but merely indicated that the defense was prepared to go to trial.

In re R.A.B., 197 Ill. 2d 358, 757 N.E.2d 887 (2001) Under 705 ILCS 405/5-36(d), a minor charged with being a violent juvenile offender has the right to a trial by jury. The Supreme Court reversed the minor's adjudication because the record failed to show a knowing and voluntary jury waiver. Unlike the Criminal Code, the Juvenile Court Act has no provision requiring that a jury waiver be in writing. However, a jury waiver is valid only where it is made "knowingly" and "understandingly." No specific admonition or advice is required for an effective jury waiver - whether a waiver is valid depends on the facts and circumstances of each case. Because the minor was never informed in open court that he had the right to a jury trial, and the question of waiving the jury was never discussed in his presence, the purported jury waiver was not knowing and voluntary. Neither "vague references" to the nature of a stipulated bench trial nor an admonishment of the rights to a hearing and confrontation specifically informed the minor that he could demand a jury trial. The minor's failure to object when his attorney referred to a stipulated bench trial did not establish a valid waiver - the record contained no indication that the respondent was aware of his right to a jury trial, and there was no discussion in open court concerning a jury waiver. In addition, the minor's experience with juvenile proceedings that did not carry the right to a jury determination did not establish that he knew of his right to a jury trial on a violent juvenile offender petition. See also, **People v. Williamson**, 311 Ill.App.3d 54, 724 N.E.2d 167 (1st Dist. 1999).

People v. Bracey, 213 Ill.2d 265, 821 N.E.2d 253 (2004) Although a written jury waiver is one means by which the defendant's intent may be established, the presence or absence of a written waiver is not dispositive. In this case the record was insufficient to establish a knowing and voluntary jury waiver. Defendant was convicted in a bench trial but that conviction was vacated by the trial judge because defendant had not been allowed to testify. The cause was set for a new trial before a different judge but defendant was never advised that he had the right to request a jury at the second trial. Instead, the judge who presided over the second trial presumed that the jury waiver from the first trial carried over. The second judge made no effort to determine whether defendant intended to waive a jury, and merely set the cause for a bench trial and defense counsel made no statements in defendant's presence indicating an intention to surrender the right to a jury trial. Under these circumstances, defendant's silence at the second bench trial was insufficient to show a knowing and voluntary waiver.

People v. Lindsey, 201 Ill.2d 45, 772 N.E.2d 1268 (2002) Neither the constitutional right to be present at all critical proceedings nor Illinois statutory law were violated where defendant was not personally present during his arraignment or jury waiver, but was represented by counsel and participated by closed circuit television.

People v. Bannister 232 Ill.2d 52, 902 N.E.2d 571 (2008) The trial court has the duty to ensure that a defendant who wishes to waive a jury trial does so knowingly and voluntarily. No specific admonitions are required for an effective jury waiver, however. Unless there is some indication in a particular case that sentencing information would have had a bearing on the defendant's decision, accurate admonishments concerning the maximum and minimum authorized sentences are not required for a valid jury waiver. Because the minimum and maximum sentences are the same whether a judge or jury is the trier of fact, sentencing information generally has no effect on the decision to waive a jury. To make an adequate waiver of the right to a jury trial, the defendant must understand that the facts of the case will be determined by a judge, not by a jury. Because the record showed that the defendant knew the difference between a bench trial and a jury trial, and voluntarily choose a bench trial, the jury waiver was valid.

People v. Frey, 103 Ill.2d 327, 469 N.E.2d 195 (1984) Although there was no signed or express jury waiver, the record showed that defendant did waive a trial by jury. A jury waiver does not rest on "any precise formula," but "turns on the facts and circumstances of each particular case." The Court noted that jury waivers can be made by counsel in the defendant's presence. Furthermore, the record need not "affirmatively" establish that the trial court advised defendant of his right to a jury trial and elicited his waiver of that right, or that the court or counsel advised defendant of the consequences of waiving a jury. Here, the "defendant was aware of his right to a jury trial and was present prior to trial when the jury waiver was discussed," and defendant was not "unsophisticated, uneducated or simple-minded."

People v. Brown, 169 Ill.2d 132, 661 N.E.2d 287 (1996) A death penalty defendant has a statutory right to a jury sentencing even where he was convicted at a bench trial, and a judge may not require defendant to waive the jury for sentencing in order to obtain a bench trial. The trial court erred by insisting that defendant's waiver of a jury was for both phases of the trial.

People v. Tooles, 177 Ill.2d 462, 687 N.E.2d 48 (1997) Although 725 ILCS 5/115-1 requires that a jury waiver be in writing, the failure to obtain a written waiver is harmless where the record shows that the defendant knowingly and voluntarily waived a jury. See also, **People v. Even**, 291 Ill.App.3d 38, 683 N.E.2d 193 (2d Dist. 1997) (record did not show voluntary waiver where defendant was not present when counsel requested a bench trial, the question of a jury trial had never been discussed in defendant's presence before trial, and defendant refused to sign a jury waiver after trial).

People v. Lach, 302 Ill.App.3d 587, 707 N.E.2d 144 (1st Dist. 1998) Where the defendant did not speak English and was not personally advised by the court or his attorney of his right to a jury trial, and there was nothing to indicate that a knowing waiver occurred, the record was insufficient to establish a valid waiver. Where a defendant is unable to speak English, there is an "even more compelling" need for the trial court to "personally [address] defendant on the record regarding his understanding of the jury waiver" before proceeding to a bench trial.

People v. Elders, 349 Ill.App.3d 573, 812 N.E.2d 649 (1st Dist. 2004) An oral jury waiver may be sufficient where, in the defendant's presence and without objection, defense counsel expressly advises the court that the defendant wants a bench trial. Counsel must make some affirmative statement that defendant wishes to forego his right to a jury trial, however, and a defendant will not be deemed to have acquiesced in a jury waiver made by his attorney outside the defendant's

presence. Here, after defendant was convicted in a bench trial, the trial court noted that there was no written jury waiver in the file. Defense counsel stated that defendant said he wanted a bench trial, and defendant signed a waiver in open court. Defense counsel had said at several pretrial hearings that he wanted a bench trial, but defendant was not present at those hearings. The only reference to a bench trial that occurred in defendant's presence was some 2½ weeks before the case was tried, when counsel stated that the case was set for a bench trial. The court stated that in order for a jury waiver to be valid, "at the very least, the record must disclose some evidence of some discussion in defendant's presence, prior to being found guilty, with respect to a jury waiver." The court concluded that the single reference to a bench trial made 2½ weeks before trial was insufficient to establish a waiver; "[t]his did not constitute a discussion of a jury waiver or demonstrate that defendant was aware he could choose between a jury and bench trial."

People v. Owens, 336 Ill.App.3d 807, 784 N.E.2d 339 (1st Dist. 2002) When defendant's case was called for trial the court stated: "Mr. Owens, did I previously admonish you of a jury." Defendant responded, "Yes." The court then proceeded to a bench trial. No other indication of a jury waiver was contained in the record, except for the notion "J.W." on the half sheet. The Appellate Court held that the record was insufficient to show a valid jury waiver. The failure to file a written jury waiver does not necessarily require reversal, so long as the waiver was made understandingly and in open court. However, because the record did not contain a signed document indicating a waiver, and defense counsel made no representation concerning the jury waiver while defendant was present, there was no basis on which it could be found that defendant knowingly and understandingly waived his right to be tried by a jury. See also, **People v. Ruiz**, 367 Ill.App.3d 236, 854 N.E.2d 701 (1st Dist. 2006); **People v. Spracklen**, 335 Ill.App.3d 768, 781 N.E.2d 1184 (3d Dist. 2002).

People v. McCarter, 385 Ill.App.3d 919, 897N.E.2d 265 (1st Dist. 2008) It is the prerogative of the defendant, rather than counsel, to decide whether to waive a jury trial. Where the trial court made no effort to ask defendant to provide further details concerning his claim that his attorney overrode his desire for a bench trial, and the trial court gave no basis for denying defendant's claim other than to state that the error was harmless because in a bench trial its finding would have been no different than that of the jury, error occurred The court noted that the denial of the right to a bench trial is structural error which cannot be harmless. The cause was remanded for the trial court to determine whether there was any proper basis to deny defendant's claim that he was improperly denied a bench trial, and to provide relief if appropriate.

People v. Watson, 246 Ill.App.3d 548, 616 N.E.2d 649 (3d Dist. 1993) Defendant demanded a jury trial, but during a pretrial hearing, defense counsel said that the case should be set for a bench trial. Counsel and the trial judge both noted that the defendant, who was not in court, would have to execute a jury waiver at a later hearing. Defendant was present during subsequent hearings when references were made to the fact that a bench trial was scheduled. However, no jury waiver was ever secured. The Court held that the record failed to establish a knowing and understanding waiver of the right to a jury trial. An attorney's request for a bench trial cannot bind a defendant who was not present when the request was made. See also, **People v. Eyen**, 291 Ill.App.3d 38, 683 N.E.2d 193 (2d Dist. 1997) (defendant acquiesces in request for bench trial only if he is present when request was made; failure to object when case is called for bench trial is not acquiescence).

People v. McGee, 268 Ill.App.3d 582, 645 N.E.2d 329 (1st Dist. 1994) On the morning defendant's trial was scheduled, the trial court released the jury because it erroneously believed that defense counsel was ill. Counsel then appeared and sought to hold the trial. Defense counsel tendered a jury waiver form to the court, and defendant said that he wanted to have the trial that day. In addition, defense counsel answered affirmatively when, just before the bench trial started, he was asked whether a jury waiver had been executed. Although the waiver form in the record was blank other than defendant's signature, the Appellate Court held that defendant "understandingly" waived his right to a jury trial, because the record showed that he knew the difference between a bench trial and a jury trial and deliberately chose a bench trial.

People v. Scott, 293 Ill.App.3d 241, 687 N.E.2d 1151 (5th Dist. 1997) A written jury waiver that was signed in defense counsel's office and never confirmed in open court was insufficient to waive a jury. In addition, defendant did not acquiesce in his attorney's request for a bench trial where the record failed to show defendant was ever advised of his right to a jury.

People v. Mixon, 271 Ill.App.3d 999, 649 N.E.2d 441 (3d Dist. 1994) A jury waiver entered for one trial does not "carry over" to a second trial on the same matter and a defendant is not bound to his jury waiver when a new trial was ordered due to the State's discovery violations.

People v. French, 84 Ill.App.3d 60, 404 N.E.2d 1136 (3d Dist. 1980) Defendant's case had been twice placed on the jury calendar before being called for a bench trial. Prior to the bench trial, the trial judge stated "defendant is present with [his] attorney and the case comes on for bench trial, right?" Defense counsel responded "That is correct, Your Honor." No additional references were made to the defendant's right to a jury trial. The lack of a formal jury waiver required reversal of defendant's conviction.

People v. Williams, 125 Ill.App.3d 284, 465 N.E.2d 1044 (4th Dist. 1984) The record showed that a "jury waiver" document, apparently signed by the defendant, was filed with the circuit clerk. However, a bystander's report executed by the trial judge stated that the above "waiver" was filed with the judge's secretary by defense counsel, and that defendant was not present at the time. Based upon the statement of the trial judge, the alleged jury waiver was not executed or confirmed in open court. This constituted "plain error." The right to a jury trial "is basic and fundamental," and no "admonishment of any kind appears in the instant record."

People v. Coleman, 59 Ill.App.3d 1050, 376 N.E.2d 277 (1st Dist. 1978) Conviction reversed and remanded because the record failed to show that defendant waived trial by jury or that his counsel made such a waiver in his presence. The single line in the common law record ("plea of not guilty — jury waived") was insufficient to show a valid waiver.

People v. Keagbine, 77 Ill.App.3d 1039, 396 N.E.2d 1341 (5th Dist. 1979) Jury waiver was not invalid where the State promised not to seek the death penalty if defendant took a bench trial.

People v. Simpson, 24 Ill.App.3d 835, 321 N.E.2d 464 (4th Dist. 1974) Waiver of jury trial was invalid where defendants were put in the position of having a jury trial without being able to contact State witnesses (due to State's late response to discovery motion) or having a bench trial with time to contact the witnesses.

People v. Phuong, 287 Ill.App.3d 988, 679 N.E.2d 425 (1st Dist. 1997) A Chinese-speaking defendant's jury waiver was not adequate where the waiver form was merely translated into Chinese, without any explanation of its meaning. A jury waiver must be made "with an understanding of the nature of the rights waived" and "may not be done in a superficial manner." Although defendant signed a jury waiver that had been translated, in the absence of any explanation of the nature of a jury trial it was unclear whether she actually possessed a sufficient level of understanding. The Court "[was] not convinced that the mere translation of the language of the waiver form adequately conveyed its meaning to defendant," especially where the defendant had no prior experience with the judicial system.

Cumulative Digest Case Summaries **§32-3(a)**

People v. Campbell, 2015 IL App (3d) 130614 (No. 3-13-0614, 8/6/15)

1. A stipulated bench trial is tantamount to a guilty plea when the State's whole case is presented by stipulation and the defendant does not present or preserve a defense, or when the stipulation states that the evidence is sufficient to convict. When a stipulated bench trial is tantamount to a guilty plea, the trial court must admonish the defendant pursuant to Illinois Supreme Court Rule 402(a). And if relevant, the court must admonish the defendant that by stipulating that the evidence is sufficient to convict, he waives his right to a jury trial.

2. Prior to trial and after receiving proper admonitions, defendant waived his right to a jury. On the next court date, defendant agreed to plead guilty in exchange for a sentencing cap. The court properly admonished defendant pursuant to Rule 402(a), including re-admonishing him about his right to a jury trial, and then accepted his plea.

Following sentencing, defendant successfully moved to withdraw his guilty plea. The parties then reached an agreement that in exchange for a 15-year sentence defendant would proceed with a stipulated bench trial. The trial court again admonished defendant pursuant to Rule 402(a), but did not admonish him about his right to a jury trial. The State presented a stipulated factual basis including a provision that the evidence was sufficient to prove defendant guilty beyond a reasonable doubt. The trial court found defendant guilty.

3. The Appellate Court held that the stipulated bench trial was tantamount to a guilty plea and thus the trial court had an obligation to fully admonish defendant pursuant to Rule 402(a), including his right to a jury trial, and that by proceeding with a stipulated bench trial defendant would be waiving his right to a jury trial. Although the trial court had previously admonished defendant about his right to a jury trial, because defendant had previously waived his right to a jury trial, it was critical that the court inform him that the right was reinstated when he withdrew his guilty plea and his prior waiver had no effect.

The Appellate Court held that the failure to properly admonish defendant about his right to a jury trial affected his fundamental right to a jury and thus was reviewable under the second prong of plain error. Defendant's conviction was reversed and remanded for further proceedings after proper admonitions.

(Defendant was represented by Assistant Defender Sarah Curry, Chicago.)

People v. Dereadt, 2013 IL App (2d) 120323 (No. 2-12-0323, 9/30/13)

1. Under 725 ILCS 5/115-4(b), a jury consists of 12 members. Illinois law does not

necessarily require a 12-person jury, however, because the right to waive a jury trial entirely necessarily includes the right to waive a jury composed of 12 members. Thus, Illinois courts have consistently held that a criminal defendant may waive a 12-member jury and proceed with a jury of fewer members.

2. Generally, defense counsel's oral waiver of the right to a jury trial is valid where the defendant is present and fails to object. The court rejected the argument that a personal waiver by the defendant was required in order to proceed with a six-person jury, finding that the waiver of a 12-person jury was valid where defense counsel stated in defendant's presence that she had spoken with defendant about whether he wanted a jury of six members or 12 members and that defendant wanted a jury of six.

(Defendant was represented by Assistant Defender Paul Glaser, Elgin.)

People v. Hernandez, 409 Ill.App.3d 294, 949 N.E.2d 1139 (2d Dist. 2011)

1. As with any waiver of a constitutional right, a waiver of the right to trial by jury not only must be voluntary, but must be a knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences. A defendant must be at least generally aware of the charges he faces before he can knowingly and intelligently decide whether guilt for those charges should be determined by a judge or a jury.

The jury waiver executed by defendant when he was charged with domestic battery did not apply to charges of obstructing a peace officer added by the State after the jury waiver. At the time of the waiver, defendant was not aware of, nor does the record indicate that he intended his waiver to cover, any later-filed charges. Defendant had no duty to withdraw his previous jury waiver for it to have no effect as to the obstruction charges. No reasonable rule can require a defendant to withdraw a waiver he never made. The very concept of a waiver – the voluntary relinquishment of a known right – implies that a defendant cannot waive jury on a yet-unknown charge.

2. Whether defendant validly waived jury turns on the facts and circumstances of each particular case. There are limited circumstances in which a defendant may sufficiently express his intent to waive the right to jury trial by acquiescence to a bench trial, such as where statements are made in the defendant's presence indicating that he was electing to forgo his right to a jury trial, and the defendant is a person of intelligence, experience, and considerable education. **People v. Frey**, 103 Ill.2d 327, 469 N.E.2d 195 (1984). A jury waiver is never valid where the defendant was not present in open court when a jury waiver was at least discussed. **People v. Bracey**, 213 Ill.2d 265, 821 N.E.2d 253 (2004).

Defendant did not waive a jury trial on the obstruction charges by not objecting to the bench trial. The case immediately proceeded to a bench trial upon the court's ruling that the State could add the obstruction charge. The record does not indicate that the defendant is a person of "established sophistication." The new charges did not clearly call for the same strategy as the old charge. In these circumstances, defendant's silence did not amount to a waiver by acquiescence of his right to a jury trial.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

People v. Hollahan, 2015 IL App (3rd) 130525 (No. 3-13-0525, mod. op. 7/16/15)

Generally, when a judgment is vacated or reversed either on appeal or in the trial court and a new trial is ordered, the defendant's right to a jury trial is restored for the new trial. As a matter of first impression, the Appellate Court held that the general rule does not apply where the defendant

enters a jury waiver that is not part of a plea agreement, subsequently pleads guilty, and is then granted leave to withdraw the plea. Thus, defendant was properly tried in a bench trial where he waived a jury about a month before he entered a guilty plea and was subsequently granted leave to withdraw the plea.

(Defendant was represented by Assistant Defender Santiago Durango, Ottawa.)

People v. Liekis, 2010 IL App (2d) 100774 (No. 2-10-0774, 7/31/12)

A bench trial may be held if the right to trial by jury is understandingly waived by the defendant in open court. While a written jury waiver is required by statute, 725 ILCS 5/115-1, the failure to file a written waiver does not require reversal if the waiver was understandingly made. Whether a jury waiver was understandingly made turns on the facts and circumstances of each particular case. An accused typically speaks and acts through his attorney, and a jury waiver is valid when made by defense counsel in the defendant's presence when the defendant gives no indication of any objection to the trial court hearing the case.

Where defendant claims that she did not waive the right to trial by jury in open court, she must present a record that sufficiently covers all proceedings that could have involved the waiver. Without an adequate record, the reviewing court must assume that the record indications of a jury waiver are indeed based on a valid waiver.

Defendant presented an incomplete record on the issue of a jury waiver. The half sheet indicated that on the day that a stipulated bench trial was conducted, "jury trial [was] waived." The agreed statement of facts indicated that defense counsel moved for a stipulated bench trial and that a stipulated bench trial was conducted immediately following the court's denial of defendant's motion to reconsider. No report of proceedings for that date was included in the record. In the absence of a report of proceedings or acceptable substitute, the court assumed that the record indication of a jury waiver were based on a valid waiver. Furthermore, the record indicates that defendant was present when her attorney told the court that she waived her right to a jury.

(Defendant was represented by Assistant Defender Christopher McCoy, Elgin.)

People v. Warnock, 2013 IL App (2d) 120057 (No. 2-12-0057, 3/20/13)

A waiver of the right to a jury trial is valid only if it is knowing. Although one means of showing the defendant's state of mind is to use a written waiver under 725 ILCS 5/103-6, the mere fact that a written waiver is filed does not necessarily establish that the waiver is valid. Generally, an oral waiver is valid if made by defense counsel in defendant's presence in open court and without objection by the defendant.

There was no valid jury waiver where the case was set for a jury trial, on the day of trial the prosecutor asked for a short continuance to obtain witnesses because "he understood this to be a jury trial," defense counsel objected to the continuance but made no reference to a bench trial, and the court proceeded to conduct a bench trial. Although what purported to be a jury waiver signed by defendant was in the record, it lacked a case number and was blank in two places where defendant's name should have been listed. Although the prosecutor's statement implied that the matter was going to be a bench trial, the court found that a tentative, negative inference from a prosecutor's statement cannot constitute a valid waiver even if the defendant fails to object.

Defendant's conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Paul Rogers, Elgin.)

Top

§32-3(b)
Withdrawal of Jury Waiver; Timely Waiver

People v. Catalano, 29 Ill.2d 197, 193 N.E.2d 797 (1963) The withdrawal of a jury waiver is within the discretion of the trial court. See also, **People v. Rand**, 291 Ill.App.3d 431, 683 N.E.2d 1243 (1st Dist. 1997).

People v. Williams, 277 Ill.App.3d 571, 660 N.E.2d 1320 (3d Dist. 1996) Defendant made an oral pretrial waiver of his right to a jury trial. At the hearing on the post-trial motion, the trial court asked defendant to acknowledge his oral waiver by executing a written jury waiver form. Defendant signed the form without objection. On appeal, the Court held that a waiver signed after trial is valid where the pretrial waiver was knowing and voluntary.

People v. Frazier, 127 Ill.App.3d 151, 469 N.E.2d 594 (1st Dist. 1984) Before any jurors were selected defendant sought to waive the jury. The trial judge denied this request as untimely, and defendant was convicted by a jury. "Plainly, the trial court erred in denying defendant's request for a bench trial since the request was made before the commencement of trial."

People v. Johnson, 122 Ill.App.3d 636, 461 N.E.2d 540 (3d Dist. 1984) Defendant was represented by the public defender until two days before trial. The trial court then appointed different counsel. In the course of discussing whether the latter counsel would have time to prepare for trial, the public defender mentioned that defendant wanted a bench trial. The judge questioned defendant, who stated that he wanted a bench trial. Two weeks later, appointed counsel was granted a continuance and filed a motion to withdraw the jury waiver, which was denied. The Appellate Court held that the trial judge should not have allowed a jury waiver immediately after granting the public defender's motion to withdraw, because the newly appointed counsel was not available to advise the defendant. "We believe that the defendant had a right to be represented by counsel and that such representation was essential in order for the defendant to knowingly and intelligently waive his right to jury trial."

People v. Spencer, 160 Ill.App.3d 509, 513 N.E.2d 514 (4th Dist. 1987) Defendant is not entitled to withdraw his jury waiver merely because the information is amended.
People v. Norris, 62 Ill.App.3d 228, 379 N.E.2d 80 (1st Dist. 1978) Defendant waived a jury in the belief that the State's case was entirely circumstantial. After opening statements, the State amended its list of witnesses to call two eyewitnesses. The defense sought a mistrial based upon the fact that defendant waived his right to a jury because he had believed that the case was circumstantial. The Appellate Court held that defendant's waiver of jury trial was not knowing and intelligent because he was not aware of the most damaging evidence against him.

People v. Zemblidge, 104 Ill.App.3d 654, 432 N.E.2d 1138 (1st Dist. 1982) Defendant sought to waive a jury at the start of closing arguments. The trial judge denied the request. The Appellate Court held that once an election for jury trial is made and testimony begins, the defendant has no absolute right to waive the jury. The decision to allow a jury waiver after the start of trial is within the discretion of the trial judge.

People v. Pruitte, 125 Ill.App.3d 580, 466 N.E.2d 341 (3d Dist. 1984) Defendant filed a petition to elect treatment as an addict under the Dangerous Drug Abuse Act . Defendant testified that after meeting with a court liaison for TASC, he believed he was qualified for treatment. The trial court admonished defendant that by filing a petition to elect such treatment he would have to waive his right to a jury trial. It was subsequently determined defendant was not eligible for treatment under the Act. However, defendant's motion to withdraw the petition and his request for a jury trial were denied. The Court held that the Dangerous Drug Abuse Act only requires a person to waive his right to a jury trial *after* his acceptance into a treatment program. The Court did not interpret the statute as requiring a jury waiver where a defendant merely elects to submit to treatment and asserts that he is an addict.

Cumulative Digest Case Summaries **§32-3(b)**

People v. Hernandez, 409 Ill.App.3d 294, 949 N.E.2d 1139 (2d Dist. 2011)

1. As with any waiver of a constitutional right, a waiver of the right to trial by jury not only must be voluntary, but must be a knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences. A defendant must be at least generally aware of the charges he faces before he can knowingly and intelligently decide whether guilt for those charges should be determined by a judge or a jury.

The jury waiver executed by defendant when he was charged with domestic battery did not apply to charges of obstructing a peace officer added by the State after the jury waiver. At the time of the waiver, defendant was not aware of, nor does the record indicate that he intended his waiver to cover, any later-filed charges. Defendant had no duty to withdraw his previous jury waiver for it to have no effect as to the obstruction charges. No reasonable rule can require a defendant to withdraw a waiver he never made. The very concept of a waiver – the voluntary relinquishment of a known right – implies that a defendant cannot waive jury on a yet-unknown charge.

2. Whether defendant validly waived jury turns on the facts and circumstances of each particular case. There are limited circumstances in which a defendant may sufficiently express his intent to waive the right to jury trial by acquiescence to a bench trial, such as where statements are made in the defendant's presence indicating that he was electing to forgo his right to a jury trial, and the defendant is a person of intelligence, experience, and considerable education. **People v. Frey**, 103 Ill.2d 327, 469 N.E.2d 195 (1984). A jury waiver is never valid where the defendant was not present in open court when a jury waiver was at least discussed. **People v. Bracey**, 213 Ill.2d 265, 821 N.E.2d 253 (2004).

Defendant did not waive a jury trial on the obstruction charges by not objecting to the bench trial. The case immediately proceeded to a bench trial upon the court's ruling that the State could add the obstruction charge. The record does not indicate that the defendant is a person of "established sophistication." The new charges did not clearly call for the same strategy as the old charge. In these circumstances, defendant's silence did not amount to a waiver by acquiescence of his right to a jury trial.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

People v. Hollahan, 2015 IL App (3rd) 130525 (No. 3-13-0525, mod. op. 7/16/15)

Generally, when a judgment is vacated or reversed either on appeal or in the trial court and

a new trial is ordered, the defendant's right to a jury trial is restored for the new trial. As a matter of first impression, the Appellate Court held that the general rule does not apply where the defendant enters a jury waiver that is not part of a plea agreement, subsequently pleads guilty, and is then granted leave to withdraw the plea. Thus, defendant was properly tried in a bench trial where he waived a jury about a month before he entered a guilty plea and was subsequently granted leave to withdraw the plea.

(Defendant was represented by Assistant Defender Santiago Durango, Ottawa.)

Top

§32-4
Selection of Jury

§32-4(a)
***Voir Dire* Generally**

U.S. v. Martinez-Salazar, 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000) Federal prosecutions are subject to **Ross v. Oklahoma**, 47 U.S. 81 (1988), which held that due process is not violated by the trial court's erroneous denial of a motion to remove a juror for cause where the defendant exercised a peremptory challenge and the jury which subsequently decided the case was impartial. However, the court rejected the prosecution's argument that to preserve a claim that the error violated the right to a fair trial, a federal defendant must use any available peremptory to strike the juror who should have been removed for cause. Once the trial judge erroneously denies a motion to excuse for cause, the defendant may choose to either use a peremptory challenge to remove the objectionable juror or, "upon conviction, pursu[e] a Sixth Amendment challenge on appeal."

Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 942 (1992) Due process requires that a death penalty jury not be composed of individuals who have already decided how they will vote on the ultimate issue. Thus, a capital defendant is entitled to excuse for cause any juror who is unwilling to consider a non-death sentence and he also has the right to conduct a *voir dire* that will provide adequate information to determine whether a particular juror is subject to challenge. Refusing to allow defendant to question prospective jurors about their willingness to consider sentences other than death prevents the intelligent exercise of challenges for cause and renders meaningless the right to be tried by an impartial jury. General questioning on the jurors' ability to follow the law and remain impartial is not sufficient to determine if any veniremen would refuse to consider a non-death sentences. See also, **People v. Johnson**, 159 Ill.2d 97, 636 N.E.2d 485 (1994) (trial court should have asked whether any veniremembers believed that a death sentence must be imposed if requested by the State).

Uttecht v. Brown, 501 U.S. 1, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007) **Witherspoon v. Illinois**, 391 U.S. 510 (1968) and its progeny establish four principles concerning the selection of jurors in a capital case. First, a criminal defendant has the right to an impartial jury drawn from a venire that is not "tilted" in favor of capital punishment by the prosecution's selective use of challenges for

cause. Second, the State has a strong interest in having jurors who are capable of applying capital punishment within the framework prescribed by State law. Third, to balance these interests, a juror who is substantially impaired in his ability to impose a death sentence is subject to being excused for cause. Fourth, in determining whether the removal of a potential juror violates the right to an impartial jury, the trial court's judgment is based in part on the demeanor of the juror. The trial court's determination is owed deference, however, the need to defer to the trial court's ability to perceive jurors' demeanor does not "foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment." The record here showed that the juror was confused and ambiguous about whether he would be able to apply the relevant death penalty law, despite several attempts by the judge and the attorneys to correct his misunderstandings and confusion and all of the interested parties in the courtroom believed that it was appropriate to excuse the veniremember for cause.

Rivera v. Illinois, ___ U.S. ___, 129 S.Ct. 1446, 173 L.Ed.2d 320 (2009) Because the Federal Constitution does not mandate peremptory challenges in jury selection, no federal issue exists where a defendant is improperly denied a peremptory challenge under State law, so long as the jury which heard the case was qualified and composed of individuals who were not subject to challenge for cause. Under such circumstances, the remedy for the improper denial of a peremptory challenge is left to State law. Where Illinois law authorized the Illinois Supreme Court to hold that the improper denial of a peremptory challenge was harmless error, no federal issue existed.

Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986) The trial court must question veniremembers regarding racial prejudice where there are "special circumstances" suggesting a constitutionally significant likelihood that such prejudice might affect the trial. See also, **Ristaino v. Ross**, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976).

People v. Neal, 111 Ill.2d 180, 489 N.E.2d 845 (1985) The trial court may, at its discretion, conduct individual *voir dire* out of the presence of other jurors but is not required to do so.

People v. Strain, 194 Ill.2d 467, 742 N.E.2d 315 (2000) The purpose of *voir dire* is to obtain sufficient information to permit challenge of veniremembers who are so prejudiced that they cannot apply the law in accordance with their oaths. Although the trial court has the primary responsibility for conducting *voir dire*, it must exercise its discretion concerning the extent and scope of the questioning in accordance with the purpose of disclosing any disqualifying bias on the part of jurors. Because street gangs "are regarded with considerable disfavor by other segments of our society" and especially strong prejudice against gangs may exist in metropolitan areas, where evidence related to gang membership and activity "is to be an integral part of the defendant's trial," the defense must be "afforded an opportunity to question the prospective jurors, either directly or through questions submitted to the trial court, concerning gang bias." especially where many of the witnesses were either gang members or police officers assigned to gang units and the State repeatedly stressed to the jury the importance of gang-related testimony. See also, **People v. Gardner**, 331 Ill.App.3d 358, 771 N.E.2d 26 (1st Dist. 2002); **People v. Morales**, 329 Ill.App.3d 97, 768 N.E.2d 84 (1st Dist. 2002) (**Strain** does not mandate questioning about bias against drug dealers).

People v. Kirchner, 194 Ill.2d 502, 743 N.E.2d 94 (2000) The trial judge did not err by denying

defendant's request for individual *voir dire* or by failing to ask the jurors precisely what they had read in pretrial publicity. The trial court need not question veniremembers about the content of pretrial publicity in order to protect the defendant's right to an impartial jury. Instead, the appropriate question is whether jurors are credible when claiming not to have formed an opinion that would disqualify them from hearing the case.

People v. Terrell, 185 Ill.2d 467, 708 N.E.2d 309 (1998) The trial court did not commit reversible error at a death hearing by refusing to ask potential jurors whether the age of the victim (15 months) would affect their ability to be fair. The trial court is constitutionally required to ask potential jurors about certain biases (i.e., toward gang members or concerning a minority defendant accused of committing an interracial crime), because failing to do so renders the proceedings fundamentally unfair. Where the trial court informed the venire that the decedent was a child, stated that the purpose of *voir dire* was to select a fair and impartial jury to decide the matter based solely on the evidence and law, and asked each veniremember individually whether he or she would automatically vote to impose a death sentence without regard to any mitigating evidence, the proceedings were not fundamentally unfair despite the trial court's failure to ask about possible bias based on the decedent's age.

People v. Hope, 184 Ill.2d 39, 702 N.E.2d 1282 (1998) The trial judge must question veniremembers regarding racial prejudice if there are "special circumstances" which suggest "a significant likelihood that racial prejudice might infect a defendant's trial." Such "special circumstances" exist where racial issues are "inextricably bound up with the conduct of the trial." Although the fact that the defendant and victim are of different races does not necessarily require questions concerning racial prejudice, a capital defendant accused of an interracial crime is entitled, upon request, to have the prospective jurors informed of the victim's race and asked about any possible racial bias. Here, the questions asked and admonishments given during *voir dire* were not sufficient to reveal any possible interracial crime bias. The trial court's admonishments concerning racial bias were given to only two of the four venires from which the jury was selected - indeed, seven of the 12 jurors who sentenced defendant were not admonished that race was to play no role in their deliberations. Furthermore, although several jurors responded to the trial court's questioning by disclosing that they were racially prejudiced against the defendant, the trial court failed to inform the venire that the decedent was caucasian. General questioning about racial prejudice is insufficient to determine whether veniremembers are biased due to the interracial nature of the crime.

People v. Macri, 185 Ill.2d 1, 705 N.E.2d 772 (1998) A death penalty defendant was not entitled to *voir dire* prospective jurors concerning whether they would: (1) be able to "hold out" against a death sentence if the remaining jurors were all in favor of death, or (2) respect the opinion of any juror who was opposed to a death sentence. **Morgan** questioning focuses only on whether a prospective juror has predetermined that a death sentence should be imposed, a subject which has no correlation to a juror's ability to "stand alone." In addition, the questions defendant sought to ask concerned matters related to jury deliberations, which are to be covered by the instructions the jury receives before it deliberates rather than by *voir dire* questioning, and did not involve the presumption of innocence, defendant's right not to testify, or the State's burden of proof.

People v. Brown, 204 Ill.2d 422, 792 N.E.2d 788 (2002) Under **Morgan v. Illinois**, 504 U.S. 719

(1992), at the request of a capital defendant, the trial court must ask all potential jurors whether they would automatically vote to impose a death penalty should defendant be convicted of murder. The trial judge failed to comply with **Morgan** where he first asked whether any jurors had strong feelings for or against the death penalty, and then asked only the jurors who admitted to strong feelings whether they would automatically impose a death sentence. Whether a prospective juror has strong feelings or beliefs about the death penalty cannot be equated with whether he or she would automatically impose a death sentence - "[t]he question left open the possibility that a juror would vote to impose a death penalty automatically upon a finding of guilt, yet characterize his feelings and beliefs about the death penalty as other than 'strong.'"

People v. Houston, 226 Ill.2d 135, 874 N.E.2d 23 (2007) Supreme Court Rule 608(a)(9) provides that in non-death cases, a court reporter "shall take the record of proceedings regarding the selection of the jury." However, the proceedings "need not be transcribed unless a party designates that such proceedings be included in the record on appeal." The Court found that defense counsel acted improperly by waiving the presence of a court reporter for *voir dire*. The plain meaning of Rule 608(a)(9) is that in non-death cases, the court reporter is to take notes of the *voir dire*. However, those notes need be transcribed only if one of the parties asks that they be included in the record on appeal. Defense counsel is not necessarily ineffective for waiving the presence of a court reporter for *voir dire*, because prejudice cannot be presumed from the mere failure to insure that *voir dire* is recorded. The situation changes, however, when a jury selection issue is raised on appeal. Because the absence of a *voir dire* record makes it "virtually impossible" for defendant to pursue such a claim, clearly violates Rule 608(a)(9), and results in "no possible strategic advantage" to the defense, the decision to waive the presence of the reporter is objectively unreasonable.

People v. Metcalfe, 202 Ill.2d 544, 782 N.E.2d 263 (2002) In the absence of a motion by defense counsel, the trial judge has no duty to strike a potentially biased juror *sua sponte*. To impose a duty upon a trial court to *sua sponte* excuse a juror for cause in the absence of a defendant's challenge for cause or exercise of a peremptory challenge would allow a defendant "two bites of the apple." A defendant could allow a juror . . . whose experience with the criminal justice system was not satisfactory, to sit on his jury and gamble that the juror's bias was directed against the State and thus would work in his favor. Then, if convicted, defendant could claim that the trial court erred in failing to strike the juror *sua sponte*. In addition, if the trial court strikes a juror *sua sponte* and the defendant is convicted, the defendant could later challenge his conviction on the ground that the trial court erred in striking the juror.

People v. Zehr, 103 Ill.2d 472, 469 N.E.2d 1062 (1984) It was reversible error for the trial judge to refuse to ask prospective jurors the following questions tendered by the defense: (1) If at the close of all the evidence and after you have heard arguments of counsel you believe that the State has failed to sustain the burden of proof and has failed to prove the defendant guilty beyond a reasonable doubt, would you have any hesitation whatsoever in returning a verdict of not guilty? (2) If the defendant decides not to testify in his own behalf, would you hold it against him? (3) Do you understand that the defendant is presumed innocent and does not have to offer any evidence in his own behalf, but must be proved guilty beyond a reasonable doubt by the State?"

People v. Stack, 112 Ill.2d 301, 493 N.E.2d 339 (1986) The trial judge erred by refusing to ask

prospective jurors the following question tendered by defense counsel: "Do you have any feelings or viewpoints concerning the defense of insanity in a criminal case? If so, what?" The foregoing question "seeks to determine only whether the prospective juror would be biased against an insanity defense" and does not contain argumentative and misleading statements of law. The Court concluded that inquiry into the feeling or viewpoint of prospective jurors regarding an "extraordinarily controversial legal requirement against which many members of the community may have been prejudiced" is consistent with a "bona fide examination conducted so that the parties can intelligently exercise their prerogatives to challenge."

People v. Bowel, 111 Ill.2d 58, 488 N.E.2d 995 (1986) The trial court did not abuse its discretion by refusing to ask prospective jurors the following questions during *voir dire*: (1) "Have you ever greeted a stranger as an acquaintance?" and (2) "[H]as a stranger ever greeted you because of a mistaken identity? Please explain?" The purpose of *voir dire* is "to assure the selection of an impartial jury," and not to "indoctrinat[e] a jury" or impanel a jury "with a particular predisposition." The above questions would not serve the purpose of discovering bias or prejudice on the part of prospective jurors; the Court found that the questions "were for the purpose of educating jurors as to the defendant's theory of defense prior to trial, and as a means of selecting a jury that was receptive to that defense."

People v. Davis, 95 Ill.2d 1, 447 N.E.2d 353 (1983) The prosecutor did not err by questioning prospective jurors about their willingness to follow the law of accountability. The prosecutor did not instruct the jury as to the law, but merely inquired whether the jurors could follow the law.

People v. Porter, 111 Ill.2d 386, 489 N.E.2d 1329 (1986) Defendant contended that the trial judge erred by failing to ask prospective jurors whether they were acquainted with any of the parties, attorneys, witnesses, victims or their families and whether they were familiar with the facts of the case. The Supreme Court pointed out that defense counsel did not request that the above questions be asked, and held that the scope of the *voir dire* was sufficient.

People v. Lear, 175 Ill.2d 262, 677 N.E.2d 895 (1997) A trial judge is required to question venirepersons regarding racial prejudice if there are "special circumstances" creating a likelihood that such prejudice might affect the trial. Such "special circumstances" exist where racial issues are "inextricably bound up with the conduct of the trial." Although the mere fact that the defendant and victim are of different races does not ordinarily create a "special circumstance," a capital defendant on trial for an interracial crime is entitled, upon his request, to have the sentencing jury informed of the race of the victim and questioned about racial bias.

People v. Seuffer, 144 Ill.2d 482, 582 N.E.2d 71 (1991) A prospective juror who initially expressed disapproval of the insanity defense because it has "been abused," but who later repeatedly stated that he would be impartial was not subject to disqualification on the ground that he was opposed to the insanity defense.

People v. Howard, 147 Ill.2d 103, 588 N.E.2d 1044 (1991) The trial court did not err by refusing to *voir dire* prospective jurors without having other veniremembers in the room. There was no reason to believe that the jurors failed to fully and frankly answer questions, or that their responses

influenced any other juror or that the jurors selected were not impartial. Also the trial court did not abuse its discretion by refusing to inquire about the jurors' views of handguns. Use of a handgun "was not a central issue at trial."

People v. Towns, 157 Ill.2d 90, 623 N.E.2d 269 (1993) The Court rejected the argument that the panel should have been sworn before *voir dire*. The statute which states that prior knowledge of a case "shall not disqualify [a prospective juror] if he shall upon oath state that he believes he can fairly and impartially render a verdict" does not require that prospective jurors be sworn before *voir dire*. Instead, the statute requires only that an oath of impartiality may be required where a venireman appears to have prior knowledge of the case.

People v. Daniels, 172 Ill.2d 154, 665 N.E.2d 1221 (1996) A defendant charged with murder asserted his right to a jury trial but waived a jury for sentencing. The trial court held that because there was to be a bench sentencing, the cause was no longer a "capital" case. Thus, the judge allowed defendant only seven peremptories rather than the 14 authorized for "capital" cases. The Court concluded that whether a cause should be characterized as a "capital case" depends not on whether the defendant waives a jury for sentencing, but whether he is "potentially subject to the death penalty upon conviction." Thus, any case "in which a defendant may be eligible for the death penalty upon conviction . . . is properly viewed as a capital case irrespective of whether defendant waives his right to a jury for the death eligibility or the aggravation and mitigation phase of sentencing." The defendant's rights were clearly "impaired" here, where the defense used all the peremptory challenges allowed, named two jurors it would have excluded with additional peremptories and was forced to use one peremptory to excuse a juror who arguably should have been excused for cause.

People v. Mahaffey, 165 Ill.2d 445, 651 N.E.2d 174 (1995) Defendant claimed that due process was violated because Illinois law provides that in a joint trial, the prosecution is to receive the same number of peremptory challenges as all the defendants combined. (Defendant was tried with a co-defendant, and each received 12 challenges while the State received 24.) The Court held that peremptory challenges are not of "constitutional magnitude," and each State is free to determine the number and use of such challenges in its courts. Because defendant received the number of peremptory challenges afforded him by State law, no due process violation occurred.

People v. Moss, 108 Ill.2d 270, 483 N.E.2d 1252 (1985) The Supreme Court held that the trial judge did not abuse his discretion by prohibiting defense counsel from using a peremptory challenge to "back-strike" a juror. The Court noted that under the "traditional approach" to jury selection, a party who tenders a panel may use a peremptory challenge against a prospective juror originally tendered if the opposing party excuses a juror, accepts another and retenders the panel. However, Supreme Court Rule 434(a) merely permits use of the traditional method unless the trial judge directs that a different procedure be used. However, a trial judge can alter the usual procedure for exercising peremptory challenges if both parties have adequate notice of the system to be used and the method chosen does not unduly restrict the use of challenges. See also, **People v. Page**, 196 Ill.App.3d 285, 553 N.E.2d 753 (3d Dist. 1990) (judge did not abuse discretion in refusing to allow back-striking).

People v. Scott, 148 Ill.2d 479, 594 N.E.2d 217 (1992) The trial court refused to ask whether any veniremen had any "feelings or viewpoint" concerning the insanity defense. Defendant argued that

the refusal was an abuse of discretion under **People v. Stack,** 112 Ill.2d 301, 493 N.E.2d 339 (1986), which held that an identical question should have been asked. The Court affirmed, holding that other questions about insanity (whether veniremen would be able to vote an insanity verdict, agreed with the concept of an insanity defense and believed that an insane person could commit a crime) were adequate to disclose any bias against the insanity defense.

People v. Bennett, 282 Ill.App.3d 975, 669 N.E.2d 717 (3d Dist. 1996) A defendant's constitutional rights to an impartial jury and to be present were violated where 16 of the 29 veniremembers were questioned outside defendant's presence; defendant could have helped counsel decide whether peremptory challenges should be exercised against any of five members of the petit jury who were questioned in defendant's absence, and the trial court's asserted reason for excluding defendant (security) was not sustained by the record.

People v. Thomas, 89 Ill.App.3d 592, 411 N.E.2d 1076 (1st Dist. 1980) One prospective juror stated that her father, a police officer, died when she was young. The trial court denied defense counsel's request to inquire whether he died of natural causes or during the course of his duties. Defense counsel was also prevented from asking another juror, who mentioned that her house had been burglarized, whether anyone was arrested. Finally, the court refused to ask several prospective jurors whether they would follow the law regardless whether they agreed with it. The Court held that each of these questions was probative and relevant in determining whether the jurors would be fair and impartial. Reversed and remanded.

People v. Allen, 313 Ill.App.3d 842, 730 N.E.2d 1216 (2d Dist. 2000) Under amendments to Supreme Court Rule 431 that took effect May 1, 1997, the trial court "shall permit the parties to supplement [*voir dire*] examination by such direct inquiry as the court deems proper for a reasonable period of time depending on the length of examination by the court, the complexity of the case, and the nature of the charges." Rule 431(b) was also amended to provide that upon defendant's request, the trial court is required to ask veniremembers whether they understand and will accept the presumption of innocence, the reasonable doubt standard, that the defendant is not required to offer any evidence, and that defendant's failure to testify cannot be held against him. Although the word "shall" in Rule 431(a) is "directory" rather than "mandatory," the Supreme Court's elimination of the discretionary language of the prior version of Rule 431 indicates that it intended for trial courts to exercise discretion in favor of allowing direct questioning of prospective jurors.

People v. Gregg, 315 Ill.App.3d 59, 732 N.E.2d 1152 (1st Dist. 2000) Under **People v. Zehr**, 103 Ill.2d 472, 469 N.E.2d 1062 (1984) and Supreme Court Rule 431(b), a defendant who intends to raise an insanity defense is entitled, at his request, to have the prospective jurors informed of the defendant's burden to prove insanity by a preponderance of the evidence. In addition, the defendant is entitled to determine whether prospective jurors are biased due to a belief that the defendant's burden of proof for insanity should be beyond a reasonable doubt.

People v. James, 304 Ill.App.3d 52, 710 N.E.2d 484 (2d Dist. 1999) The Court held that a prospective juror's Fifth Amendment right against self-incrimination extends to jury selection procedures. Thus, the prosecutor acted improperly by questioning veniremembers about whether they had ever used illegal drugs. While the court acknowledged that a potential juror's views about illegal

drug use is a proper subject for *voir dire*, such information "may be elicited without trampling the constitutional rights of potential jurors."

People v. Gilbert, 379 Ill.App.3d 106, 882 N.E.2d 1140 (1st Dist. 2008) At the time of trial, Supreme Court Rule 431(b) stated that "[i]f requested by the defendant," the trial court must question the jury venire about the presumption of innocence, the reasonable doubt standard of proof, the requirement that defendant need not offer any evidence, and the principle that the failure to testify cannot be held against the defendant. While the case was on appeal, Rule 431(b) was amended to delete the requirement that the defense must request such questioning. The Court held that the amended version of Rule 431(b) did not apply retroactively to trials which occurred before its effective date. The court acknowledged, however, that the amended version of Rule 431(b) imposes a duty on the trial court to question each potential juror *sua sponte*, whether or not the defendant makes a request.

People v. Reed, 376 Ill.App.3d 121, 875 N.E.2d 167 (3d Dist. 2007) Supreme Court Rule 608(a)(9) provides that in non-death cases, a court reporter shall take notes of the jury selection. However, those notes need not be transcribed unless a party designates jury selection proceedings to be included in the record on appeal. In **People v. Houston**, 226 Ill.2d 135, 874 N.E.2d 23 (2007), the Illinois Supreme Court found that defense counsel improperly waived a court reporter for *voir dire*, and remanded the cause with directions to reconstruct the *voir dire* record so the reviewing court could consider the defendant's claim of error in jury selection. In **Houston**, the Supreme Court explicitly stated that the mere failure to insure the presence of a court reporter during *voir dire* is not necessarily ineffective assistance of counsel. Here, because defendant raised no allegation of error concerning jury selection, counsel was not ineffective.

People v. Garstecki, 382 Ill.App.3d 802, 890 N.E.2d 557 (3d Dist. 2008) Noting a conflict in precedent, the Appellate Court concluded that Supreme Court Rule 431, which provides that the trial court "shall" permit the parties to supplement *voir dire* by direct questioning as deemed proper by the court under the circumstances, affords the parties the right to directly question prospective jurors, subject only to reasonable limitations of scope and time. However, the trial judge's failure to allow the parties to question jurors directly did not require reversal where the trial court thoroughly inquired into all the areas which defendant wished to raise in direct questioning. Because the court's examination was sufficient to ensure an impartial jury, the verdict would have been the same had defendant questioned the prospective jurors directly.

People v. Lanter, 230 Ill.App.3d 72, 595 N.E.2d 210 (4th Dist. 1992) The trial court refused to ask veniremen whether they had "any feelings concerning the use of alcohol or drugs" which could affect their ability to be jurors. The trial court stated that because every person has some feelings about alcohol and drugs, the question had not been asked in proper form. Although not every affirmative defense is so controversial as to require specific questioning during *voir dire*, the court should allow questions which seek to discover whether venire members are prejudiced against the intoxication defense, especially where no other questions relating to alcohol or drugs are asked. The trial court's failure to elicit the pertinent information, or to allow defense counsel to do so, violated the right to a fair and impartial jury.

People v. Oliver, 265 Ill.App.3d 543, 637 N.E.2d 1173 (1st Dist. 1994) The trial court agreed to ask several questions tendered by the defense, including whether the veniremember or a relative or close friend had ever been the victim of a crime. However, the trial court asked only that veniremembers stand if they or members of their family had ever been victims of armed robbery, rape or sexual assault or if a close friend or relative had been the victim of a homicide. When 15 to 20 veniremembers stood, the judge asked whether there was anything about their experiences that would prevent them from being fair and impartial. Only one veniremember said that he could not be fair. The Appellate Court held that the trial judge abused his discretion by failing to give defense counsel an adequate opportunity to determine possible bias. Not only did the trial court fail to individually question jurors who had been victims of prior offenses, but the question that was asked was "compound, confusing, unduly restrictive, and made it impossible to determine whether defendant received a fair and impartial jury."

People v. Green, 282 Ill.App.3d 510, 668 N.E.2d 158 (1st Dist. 1996) Where during or just after *voir dire* it "comes to the attention of the trial court that there are facts that contradict answers given on *voir dire*," and only a minor delay would result from allowing a limited inquiry to resolve the contradictions, the trial court should grant a request to reopen *voir dire*.

People v. Delgado, 231 Ill.App.3d 117, 596 N.E.2d 149 (1st Dist. 1992) A trial court has inherent authority to grant a party an additional peremptory challenge. But see, **People v. Hobley**, 159 Ill.2d 272, 637 N.E.2d 992 (1994) (Supreme Court declined to decide whether the trial court may allow additional peremptories).

Cumulative Digest Case Summaries **§32-4(a)**

People v. Adkins, 239 Ill.2d 1, 940 N.E.2d 11 (2010)

The purpose of *voir dire* is to assure the selection of an impartial panel of jurors free from either bias or prejudice. The decision of the trial court to excuse a juror due to an untruthful response is a matter lying solely within the discretion of the trial court. An abuse of discretion will be found only if the conduct of the court thwarted the selection of an impartial jury.

The trial court excused a juror for cause on motion of the State because she denied that she had been an accused in a criminal case when in fact she had been charged with misdemeanor battery 16 years earlier. The trial court did not abuse its discretion, even though no inquiry was made to determine if the juror merely forgot about the previous charge, because excusing the juror did not impede the selection of an impartial jury.

(Defendant was represented by Assistant Defender Allen Andrews, Supreme Court Unit.)

People v. Belknap, 2014 IL 117094 (No. 117094, 12/18/14)

1. At the time of trial, Supreme Court Rule 431(b) required the trial court to ask each potential juror whether he or she understood and accepted several principles, including: (1) the presumption of innocence, (2) the reasonable doubt standard; (3) that the defendant is not required to offer evidence; and (4) that the defendant's failure to testify could not be held against him. The Supreme Court reiterated that the trial judge is required to ask not only whether the prospective juror accepts such principles but also whether he or she understands them. The court accepted the State's concession that the trial judge erred by asking prospective jurors only whether they accepted the Rule 431(b) principles and not also whether they understood them.

2. The trial court's failure to comply with Supreme Court Rule 431(b) can constitute plain error only under the first prong of the plain error test, for clear or obvious error where the evidence is so closely

balanced that the error alone threatened to tip the scales of justice against the defendant. **People v. Thompson**, 238 Ill. 2d 598, 939 N.E.2d 403 (2010). When reviewing a forfeited claim under the first prong of the plain error doctrine, the reviewing court must undertake a commonsense analysis of all of the evidence in context.

After examining the evidence, the Supreme Court rejected the Appellate Court's holding that the evidence was closely balanced. Although there were no eyewitnesses to the crime, other evidence pointed to the defendant as the perpetrator and excluded any reasonable possibility that someone else inflicted the injuries on the decedent. In addition, the testimony of two jailhouse informants concerning defendant's statements was consistent although the informants were not in the jail at the same time and there was no evidence that they had communicated with each other about defendant. The court concluded that viewing the evidence in a common sense manner under the totality of circumstances, the evidence was not closely balanced. Defendant's conviction for first degree murder was affirmed.

3. In a concurring opinion, Justice Burke found that **Thompson** was wrongly decided. Justice Burke would have held that Rule 431(b) errors should be considered under the fundamental fairness prong of the plain error rule and not under the closely balanced evidence prong. Thus, plain error occurs where the unasked question creates a likelihood of bias that would prevent the jury from returning a verdict according to the facts and the law.

(Defendant was represented by Assistant Defender Andrew Boyd, Ottawa.)

People v. Garstecki, 234 Ill.2d 430, 917 N.E.2d 465 (2009)

1. Supreme Court Rule 431, which provides that the trial court "shall permit the parties to supplement" *voir dire* examination by direct inquiry "as the court deems proper for a reasonable period of time depending on the length of examination by the court, the complexity of the case, and the nature of the charges," requires the trial court to consider the factors specified by the rule when counsel asks to participate directly in *voir dire*. A trial court may not simply dispense with attorney questioning whenever it wants, and should exercise its discretion in favor of permitting direct inquiry.

2. The trial court complied with Rule 431 when, before ruling on defense counsel's request to participate in *voir dire*, the court asked what questions the defense attorney would pose, explained that the court intended to cover the same areas in its questioning, inquired concerning the complexity of the legal issues involved in the case, and after its own *voir dire* allowed defense counsel to directly question prospective jurors based on their answers to the trial court's questioning. "[T]he court did exactly what the rule mandates: it considered the appropriate factors and allowed whatever supplemental questioning it deemed appropriate for the case."

3. The court rejected defendant's argument that Supreme Court Rule 431 requires that attorneys be allowed to directly question the entire venire in every case.

People v. Glasper, 234 Ill.2d 173, 917 N.E.2d 401 (2009)

1. Under the version of Supreme Court Rule 731(b) applicable to this case, upon the defendant's request the trial court was required to ask potential jurors about four principles: (1) the presumption of innocence; (2) the reasonable doubt standard; (3) that the defendant was not required to offer evidence; and (4) that defendant's failure to testify could not be held against him.[1] When defense counsel asked that the trial court to question prospective jurors concerning the principle that defendant's failure to testify could not be held against him, the judge responded, "I don't ask them about that. I tell them."

The Supreme Court found that the refusal to honor defendant's request clearly violated Rule 431(b):

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[1]Rule 431(b) was subsequently amended and now requires the trial court to ask the above questions without regard to a defense request, except that no inquiry is to be made into defendant's failure to testify if the defense objects.

> We reiterate that, under the rule applicable at the time, once a defendant makes the request, the decision to question the venire in accordance with Rule 431(b) is not discretionary – it is a requirement. We likewise reiterate that the rules of this court are not mere suggestions. They have the force of law, and they should be followed.

2. The court concluded, however, that the failure to comply with Rule 431(b) was harmless. First, questioning under Rule 431(b) does not involve a structural error or a fundamental or constitutional right. Indeed, at the time of trial, the right was available only on request. Furthermore, a structural error requiring reversal *per se* must render the trial fundamentally unfair or unreliable, a requirement which the failure to comply with Rule 431(b) cannot satisfy.

Thus, the failure to comply with Rule 431(b) may be harmless if the evidence of guilt is overwhelming. After reviewing the evidence, the court found that no rational juror could have voted to acquit. Therefore, the error was harmless. (See also **PROSECUTOR**, §§41-3, 41-12).

(Defendant was represented by Assistant Defender Elizabeth Botti, Chicago.)

People v. Glasper, ___ Ill.2d ___, ___ N.E.2d ___ (2009) (No. 103937, 6/18/09), which held that Rule 431(b) violations are subject to harmless error analysis, applies only to the pre-2007 version of the rule, which required a defense request that the trial court make the above inquiries.

2. The trial court did not satisfy Rule 431(b) where it addressed some of the above principles in its questioning, but failed to afford all of the veniremembers a chance to respond. Furthermore, questions asked by the prosecutor and defense attorney cannot "cure" the trial court's failure to ask questions required under Rule 431(b).

(Defendant was represented by Assistant Defender Michael Wilson, Chicago.)

People v. Rinehart, 2012 IL 111719 (No. 111719, 1/20/12)

The trial court is primarily responsible for initiating and conducting *voir dire*, though it must permit the parties to supplement its examination "by such direct inquiry as the court deems proper." Supreme Court Rule 431(a). Because there is no precise test for determining which questions will filter out partial jurors, the manner and scope of the examination rests within the discretion of the trial court and will be reviewed only for an abuse of discretion. An abuse of discretion occurs when the conduct of the trial court thwarts the purpose of the *voir dire* examination—namely, the selection of a jury free from bias or prejudice.

Voir dire questions must not be a means of indoctrinating a jury or impaneling a jury with a particular predisposition. Rather than a bright-line rule, this is a continuum. Broad questions are generally permissible. Specific questions tailored to the facts of the case and intended to serve as "preliminary final argument" are not.

Asking prospective jurors in a sexual assault prosecution whether they could think of reasons why a sexual assault victim might not immediately report an incident were within permissible boundaries. The questions were not fact-driven but focused on the jurors' preconceptions about sexual assault cases in an effort to uncover any bias regarding delayed reporting. An answer indicating a juror was less likely to believe a victim who did not immediately report would have given the State grounds to intelligently exercise its peremptory challenges. The questions were brief, and the State did not elaborate on the subject. They were posed to only five potential jurors, one-fifth of the venire. Therefore, there was no abuse of discretion by the court.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

People v. Thompson, 238 Ill.2d 598, 939 N.E.2d 403 (2010)

1. Supreme Court Rule 431(b) requires the trial court to ask each potential juror whether he or she understands and accepts the presumption of innocence, the reasonable doubt standard, that the defendant need not present any evidence, and that the defendant's failure to testify cannot be held against him. The

method of inquiry must allow each juror to respond to specific questions concerning these principles.

The court stressed that Rule 431(b) contemplates a question and answer procedure by which the trial judge addresses each veniremember concerning their understanding and acceptance of the principles. Such questioning may occur in groups or individually, but must provide a specific opportunity for each veniremember to indicate his or her agreement and understanding.

The trial court violated Rule 431(b) where it omitted from its questioning one of the four Rule 431(b) principles - that defendant was not required to present evidence. The trial judge also violated Rule 431(b) by asking whether veniremembers understood the presumption of innocence, but not whether they accepted it.

2. However, the court found that defendant forfeited the issue by failing to raise it in the trial court, and that the forfeiture was not excused.

A. A violation of Rule 431(b) does not constitute "structural" error which requires reversal in every case. An error is structural only if it necessarily makes the trial fundamentally unfair or unreliable as a means of determining guilt or innocence. Only a limited number of errors are considered structural; examples include a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction.

The court noted that in **People v. Glasper**, 234 Ill.2d 173, 917 N.E.2d 401 (2009), it held that the failure to comply with an earlier version of Rule 431(b) was not structural error. The court concluded that the same reasoning applies to the amended version of the rule.

Although structural error would occur if a defendant was forced to stand trial before a biased jury, Rule 431(b) is but one method of insuring a fair jury. Thus, the failure to comply with Rule 431(b) does not necessarily result in a biased jury and unfair trial. Because the error does not in and of itself render the trial unreliable, the error is not structural.

B. Similarly, the forfeiture could not be excused under the "fundamental error" prong of the plain error rule. To satisfy this test, a clear or obvious error must have been so serious as to affect the fairness of the trial and challenge the integrity of the judicial process.

Because compliance with Rule 431(b) is not indispensable to a fair trial, the mere failure to comply with Rule 431(b) does not necessarily affect the fairness of the trial or challenge the integrity of the process. Thus, the plain error rule does not apply.

C. The court rejected the argument that defendant was excused from objecting to the noncompliance with Rule 431(b) under the **Sprinkle** doctrine, which relaxes the forfeiture rule where the trial court oversteps its authority in the presence of the jury or would not have been willing to consider an objection. There was no reason to believe that the trial court would have ignored an objection or would have refused to follow Rule 431(b) had the issue been raised.

D. Finally, the court rejected the argument that a "bright line" rule requiring reversal is necessary to force trial courts to comply with Rule 431(b). The court stressed that most cases in which trial courts failed to follow Rule 431(b) arose immediately after the rule was amended, and there is no reason to believe that trial judges are reluctant to follow the rule.

Defendant's conviction and sentence were affirmed.

(Defendant was represented by Assistant Defender Elena Penick, Chicago.)

People v. Wilmington, 2013 IL 112938 (No. 112938, 2/7/13)

1. Supreme Court Rule 431(b) requires the trial court to question prospective jurors concerning whether they understand and accept several principles, including that the defendant is presumed innocent, that the State must prove guilt beyond a reasonable doubt, that the defendant need not offer any evidence, and that the defendant's failure to testify cannot be held against him. The court's method of inquiry must provide each veniremember with an opportunity to respond to specific questions concerning the four principles.

The trial court admonished the veniremembers concerning the principles, and subsequently asked whether they accepted three of them - the presumption of innocence, the reasonable doubt standard, and the fact that defendant was not required to present evidence. However, the trial court failed to ask whether the jurors understood the above three principles, and failed to ask whether the jury understood or accepted that they could not hold the defendant's failure to testify against him. However, no objection was raised in the trial court.

The plain error rule allows consideration of errors that were not challenged in the trial court if either: (1) the evidence is so closely balanced that the error threatened to tip the scales of justice against the defendant; or (2) the error was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process. In **People v. Thompson**, 238 Ill.2d 598 (2010), the Supreme Court held that where the second prong of the plain error requirement is involved, the defendant is entitled to relief only if he or she can establish that the violation of Rule 431(b) resulted in a biased jury. Here, defendant argued an issue not reached in **Thompson** – whether the first prong of the plain error rule applied because the evidence was closely balanced.

The court concluded that the evidence was not closely balanced, and that the first prong therefore did not apply. Although the jury sent notes to the judge during deliberations, there was no indication that it had reached an impasse or experienced trouble reaching a verdict. In addition, the testimony of the expert witnesses did not render the case closely balanced.

Furthermore, there was unrebutted evidence that the defendant gave an inculpatory statement that was corroborated by at least some of the physical evidence. The sole inconsistency of any significance between defendant's statement and the physical evidence concerned the clothes worn by the decedent when his body was found. The court concluded that this "lone inconsistency [was not] sufficient to render the evidence in this case closely balanced for purposes of first-prong plain error."

2. Under Illinois law, five decisions ultimately belong to the defendant after consultation with his attorney: (1) what plea to enter, (2) whether to waive a jury trial, (3) whether defendant will testify, (4) whether to appeal, and (5) whether to submit an instruction on a lesser included offense. The latter decision is left to the defendant because electing to submit a lesser included offense instruction exposes the defendant to possible criminal liability which he might otherwise avoid and amounts to a stipulation that the jury could rationally convict of the lesser included offense.

3. The court concluded that the same rationale does not apply where defense counsel requests an instruction on second degree murder. Second degree murder is not a lesser included offense of first degree murder, but rather a lesser-mitigated offense requiring that all of the elements of first degree murder, plus a mitigating factor, have been proved. The court concluded that because the defendant is not exposing himself to potential criminal liability which he might otherwise avoid, he does not have the right to decide whether an instruction on second degree murder should be submitted.

(Defendant was represented by Assistant Defender Brian Koch, Chicago.)

People v. Belknap, 2013 IL App (3d) 110833 (No. 3-11-0833, 11/19/13)

Supreme Court Rule 431(b) requires that the court ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her. When the defendant objects, however, no inquiry of a prospective juror shall be made into the defendant's failure to testify.

The trial court musk ask each potential juror whether he or she understands and accepts each of the principles set forth in the rule. The trial court's failure to ask jurors if they understand the four Rule 431(b) principles is error in and of itself.

Because the trial court at no time asked any of the potential jurors in defendant's case whether they

understood any of the four 431(b) principles, error occurred, even though the court was otherwise very thorough in its 431(b) admonitions. The Appellate Court noticed the error as plain error because the evidence was closely balanced on the issue of defendant's guilt.

Wright, J., dissented, refusing to find plain error because the evidence was not closely balanced.

(Defendant was represented by Assistant Defender Andrew Boyd, Ottawa.)

People v. Belknap, 396 Ill.App.3d 183, 918 N.E.2d 1233 (3d Dist. 2009)

Supreme Court Rule 431(b) provides that the trial court shall ask each veniremember whether he or she understands and accepts the presumption of innocence, the reasonable doubt standard, that the defendant is not required to offer any evidence on his or her behalf, and that the failure to testify cannot be held against the defendant. Rule 431(b) also requires that the court provide each veniremember with an opportunity to respond to specific questions concerning these four principles. However, no inquiry concerning the failure to testify shall be made over the defendant's objection.

As a matter of plain error, the trial court violated Rule 431(b) by informing the veniremembers of the principles set forth in Rule 431(b) but without providing an opportunity for the veniremembers to respond concerning their understanding and acceptance of those principles. The court found plain error under the "closely balanced evidence" prong, because there was no direct evidence that defendant committed the offense except for the testimony of two jailhouse informants.

Defendant's convictions for first degree murder and endangering the life of a child were reversed, and the cause was remanded for a new trial.

People v. Blair, ___ Ill.App.3d ___, ___ N.E.2d ___ (2d Dist. 2011) (No. 2-07-0862, 5/27/11)

1. Supreme Court Rule 431(b) requires the trial court to *voir dire* each veniremember concerning his or her understanding and acceptance of four legal principles: (1) the presumption of innocence; (2) the reasonable doubt standard; (3) that the defendant need not present evidence; and (4) that the defendant's failure to testify cannot be held against him. In **People v. Thompson**, 238 Ill.2d 598, 939 N.E.2d 403 (2010), the Illinois Supreme Court held that compliance with Rule 431(b) is not required for a fair trial.

Thus, the failure to conduct Rule 431(b) questioning constitutes plain error under the "fundamental error" test only if the failure rises to the level of structural error. As one example of structural error, the court cited a finding that the jury which tried the case was biased.

Because defendant failed to present any evidence that the failure to fully comply with Rule 431(b) in this case resulted in a biased jury, and did not argue that the Rule 431(b) error was structural in some other way, the "fundamental error" prong of the plain error rule did not apply.

2. The **Thompson** court had no occasion to address whether the "closely-balanced-evidence" prong of the plain error rule applies to Rule 431(b) error. Because the evidence was not closely balanced here, plain error did not occur. In the alternative, the court found that defendant could not show prejudice where the prospective jurors were preliminarily informed of the principles under Rule 431(b), the error arose from the court's failure to determine whether each panel understood and accepted all of the principles, and the jury was instructed of the presumption of innocence when defendant testified.

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

People v. Blankenship, 406 Ill.App.3d 578, 943 N.E.2d 111 (2d Dist. 2010)

1. Under Supreme Court Rule 431(b), the trial court must ask each potential juror whether he or she "understands and accepts" the four **Zehr** principles (the presumption of innocence, the reasonable doubt standard, that the defendant need not offer evidence, and that the defendant's failure to testify cannot be held against him). The court concluded that no error occurred where the trial court asked each juror whether he or she "agreed" with the principles, but not whether the juror "understood" them.

In **People v. Calabrese**, 398 Ill.App.3d 98, 924 N.E.2d 6 (2d Dist. 2010), the court concluded that a rational juror would not claim to "accept" the **Zehr** principles without believing that he or she also

"understands" them. "[I]n common usage, to 'understand' a proposition is to comprehend it, while to 'accept' that proposition is both to comprehend it and to assent to it." (Rejecting **People v. Rogers**, 403 Ill.App.3d 584, 934 N.E.2d 540 (2d Dist. 2010)).

2. The court also found that even had there been error, the "fundamental fairness" prong of the plain error rule would not apply. The court interpreted **People v. Thompson**, ___ Ill.2d ___, ___ N.E.2d ___, 2010 WL 4125940 (2010) (No. 109033, 10/21/10) as holding that to avail himself of the second prong of the plain error rule based on the failure to comply with Rule 431(b), the defendant must show that the jury was biased.

(Defendant was represented by Assistant Defender Michael Delcomyn, Springfield.)

People v. Blanton, 396 Ill.App.3d 230, ___ N.E.2d ___ (4th Dist. 2009) (No. 4-08-0120, 11/10/09 rev. op.)

1. Supreme Court Rule 431(b) requires the trial court to ask each veniremember whether he or she understands and accepts several principles, including that the defendant is presumed innocent, that the State must prove guilt beyond a reasonable doubt, that the defendant need not offer evidence; and that the defendant's failure to testify cannot be held against him. Amendments which became effective in 2007 require the trial court to ask such question even in the absence of a request from the defendant, except that no inquiry shall be made concerning the defendant's failure to testify if the defense objects.

2. Plain error occurred when the trial judge asked veniremembers about the first three points under the Rule 431(b), but failed to inquire about the fourth – defendant's failure to testify. Because the record does not show a defense objection to such an inquiry, the trial court erred.

In finding plain error, the court noted that the principle prohibiting consideration of a defendant's failure to testify is "perhaps the most critical guarantee" of the criminal process, and is "vital to the selection of a fair and impartial jury." Thus, the error was so substantial as to affect the fundamental fairness of the proceeding.

Defendant's conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Michael Delcomyn, Springfield.)

People v. Bowens, 2013 IL App (4th) 120860 (No. 4-12-0860, 11/19/13)

At defendant's trial for attempt first degree murder, aggravated domestic battery, and aggravated battery, the trial judge denied a motion to excuse the judge's husband from the jury for cause. The Appellate Court affirmed on direct appeal, noting that defense counsel's failure to exercise a peremptory challenge against the judge's husband amounted to acquiescence to the husband's jury service, and therefore waived the issue for appeal.

Defendant then filed a *pro se* post-conviction petition alleging that defense counsel was ineffective for failing to use an available peremptory challenge to remove the trial judge's husband from the jury. The judge who had presided over the jury trial also heard the post-conviction petition, and summarily dismissed the petition as frivolous and patently without merit.

The court concluded that the defendant raised the gist of a constitutional claim, finding that where the defense had peremptory challenges available, it was objectively unreasonable for counsel to allow the trial judge's husband to be seated as a juror. The court noted that other jurisdictions have found that regardless whether peremptory challenges are available, the constitutional right to a fair trial is violated where the spouse or close relative of the trial judge serves as a juror. In addition, the Illinois Supreme Court has held that the conviction must be reversed and a new trial awarded where the wrongful denial of a challenge for cause denies a defendant the right to a trial before a fair and impartial jury.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

People v. Bowens, 407 Ill.App.3d 1094, 943 N.E.2d 1249 (4th Dist. 2011)

1. Defendant waived the argument that the trial court erred by failing to excuse her spouse for cause. The Appellate Court concluded that the issue was waived because, after the motion to excuse for cause was

denied, counsel failed to exercise one of his two remaining peremptories.

Although counsel was only permitted to exercise peremptories within each panel of four veniremembers, and stated that he had allocated the two remaining challenges for use against two prospective jurors whom he knew would be in the final panel, the Appellate Court found that he should have used a peremptory against the judge's husband and then asked the judge for an additional challenge. By accepting the panel with the objectionable juror while he had peremptories remaining, counsel affirmatively acquiesced to the juror's service and waived the issue for appeal.

The court added that "a possible explanation for defense counsel's failure to use a peremptory challenge . . . might be counsel's attempt to plant a seed of error, the fruit from which defendant is now trying to harvest on appeal." A party cannot "intentionally fail to avail himself of the resources provided . . . only to complain about the result on appeal."

2. The court rejected the argument that the trial court's failure to excuse her spouse for cause could be reached as plain error. Plain error analysis can apply only to procedural default – the failure to make a timely assertion of a known right – and not where the defense affirmatively acquiesces to an error. In the latter situation, defendant's only recourse is to challenge counsel's acquiescence as ineffective assistance.

3. The court declined to address whether jury service by the trial judge's spouse might be *per se* reversible error if the defendant does not acquiesce. However, "[w]e note . . . that the record contains no suggestion of some compelling need for why the trial court thought it necessary for her spouse to serve as a juror in a case over which she presided, a circumstance which strikes this court as rather unusual."

4. In dissent, Justice Pope found that "where the trial judge goes home each night of three-day trial . . . to the same home where she resides with her husband-juror," the appearance of impropriety calls into question the fundamental fairness of the trial. Justice Pope also criticized the majority's failure to discuss the ramifications of having a judge's family member serve on the jury, including that: (1) the spouse might look unkindly on a defense attorney who engages in heated discussion with the judge, (2) the trial court might be called to inquire into allegations of juror misconduct against the spouse, and (3) other jurors might be unduly influenced by the spouse's view of the case. Justice Pope also noted that "it seems extremely unlikely defendant would have been successful in obtaining an extra peremptory challenge" after the judge denied a motion to excuse her spouse for cause.

Justice Pope also noted that other jurisdictions have found that it is error to allow the judge's family member to serve as a juror in a case over which the judge presides, even where no challenge for cause was made and there is no showing of actual prejudice.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

People v. Brown, 2013 IL App (2d) 111228 (No. 2-11-1228, 5/6/13)

1. Peremptory challenges are tools for jury selection. Generally, neither party has the right to exercise a peremptory once a juror has been accepted and sworn. At least until the trial begins, however, the trial court has discretion to allow parties to exercise peremptory challenges to sworn jurors.

Neither Illinois Supreme Court Rule 434 nor 725 ILCS 5/115-4 authorizes a party to use a peremptory challenge against a sworn juror once the trial begins.

2. Adopting the reasoning of **U.S. v. Harbin**, 250 F.3d 532 (7th Cir. 2001), the Appellate Court concluded that allowing the State to exercise a peremptory challenge to excuse a juror after witnesses have testified constitutes structural error which requires automatic reversal without conducting harmless error analysis. Here, a juror realized from the testimony that defendant's parents were the pastors of a church where the juror's cousin had died after being shot by police. That death was not related to the charges against defendant, although defendant had been a witness to the shooting.

The court noted that Illinois law does not expressly authorize the use of peremptory challenges during trial, and that §115-4 authorizes at most two alternate jurors, making it practically impossible to allow mid-trial peremptory challenges. The court also noted that by allowing the State to exercise a peremptory challenge during trial, after the defendant had exercised all of her peremptories before trial, the trial court

"changed the rules when only the State could play."

3. The court rejected the State's argument that using a peremptory during trial was justified because, in its view, defense counsel violated an order *in limine*. The court stated that even if defense counsel arguably violated the order, "[a]llowing the State to invade an impartial jury is not a proper sanction for a violation of an evidentiary order."

4. The court rejected the argument that the error was harmless because the trial court had the discretion to remove the juror for cause and there is no indication that any of the jurors who deliberated were actually biased. The trial court did not indicate that it thought the juror should be removed for cause, and the record suggested that the juror was qualified to continue. Furthermore, while the erroneous pretrial exercise of a peremptory challenge might be harmless because the jury which decided the case was not actually biased, "we will not extend that presumption" to the midtrial use of a peremptory.

Defendant's convictions were reversed and the cause remanded for a new trial.

People v. Chester, 396 Ill.App.3d 1067, 926 N.E.2d 723 (4th Dist. 2010)

Supreme Court Rule 431(b) was amended in 2007 to require that even in the absence of a defense request, the trial court must question potential veniremembers about four principles: (1) that the defendant is presumed innocent; (2) that the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer evidence in his or her behalf; and (4) that the defendant's failure to testify cannot be held against him. In addition, Rule 431(b) requires the trial court to give each veniremember an opportunity to indicate whether they understand and accept these principles.

Where defendant did not object to the trial court's failure to question the venire about one of the four principles, but defense counsel admonished the veniremembers about that principle during his *voir dire*, the court concluded that no plain error occurred. The court also noted that the evidence against the defendant was so overwhelming that no rational juror would have voted to acquit.

(Defendant was represented by Assistant Defender Karen Munoz, Springfield.)

People v. Digby, 405 Ill.App.3d 544, 939 N.E.2d 581 (1st Dist. 2010)

Supreme Court Rule 431(b) requires that the trial judge ask each prospective juror, individually or in a group, whether he or she understands and accepts that (1) defendant is presumed innocent; (2) before defendant can be convicted, the State must prove him guilty beyond a reasonable doubt; (3) defendant is not required to offer any evidence on his behalf; and (4) defendant's failure to testify cannot be held against him. The rule does not dictate a particular methodology for establishing the venire's understanding or acceptance of those principles.

The trial judge complied with Rule 431(b) even though he did not use the words "understand" and "accept" during *voir dire*. He addressed each of the four principles with the venire. He asked if they "had a problem" with the principles, or if they "disagreed" with them, or whether they would hold defendant's failure to testify against him, and asked for a show of hands. There is no substantive difference between the language that the court used and the language "understands" and "accepts." Nothing in the rule requires a verbal response from each juror and there is nothing inherently unreliable in the practice of asking for a show of hands.

(Defendant was represented by Assistant Defender Stephen Gentry, Chicago.)

People v. Dixon, 409 Ill.App.3d 915, 948 N.E.2d 786 (1st Dist. 2011)

1. Under **People v. Babbington**, 286 Ill.App.3d 724, 676 N.E.2d 1326 (1st Dist. 1997), participation by an alternate juror in jury deliberations constitutes plain error which causes substantial prejudice to the defendant. In **Babbington**, the alternate juror deliberated with the jury, stayed overnight in the same hotel as the sequestered jurors, signed the verdict forms, and responded when the jury was polled.

The court concluded that defendant's post-conviction petition failed to assert the gist of a meritorious issue under **Babbington** because it was not apparent that the alternate juror participated in deliberations.

Instead, the record rebutted defendant's claim because the four verdict forms bore only the signatures of the 12 jurors, the alternate jurors had been instructed to remain in the courtroom when the jury retired to deliberate, and the only reason to believe that an alternate juror deliberated was the clerk's erroneous polling of an alternate. The court noted that the clerk apparently realized the mistake and did not complete the polling question, but the alternate juror answered "yes" when asked whether "this [was] your verdict." In view of the verdict forms with 12 signatures, the court concluded that the alternate's answer likely reflected only that he agreed with the verdict reached by the jury and not that he had participated in deliberations.

2. Furthermore, the post-conviction petition did not present the gist of a meritorious issue that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness for failing to peremptorily challenge to excuse a prospective juror who eventually became the jury's foreperson. The trial court had refused to excuse the juror for cause after he failed to mention two 20-year-old arrests when asked about his prior arrest record.

The court concluded that the defendant could not show prejudice because, in light of the overwhelming evidence of guilt, there was no reasonable probability that the defendant would have been acquitted had the foreman not been part of the jury. Because defendant could not show that trial counsel was ineffective, appellate counsel's failure to raise the issue on direct appeal was not error.

The court also noted that the juror's failure to mention two 20-year-old arrests did not indicate any bias where the juror stated during *voir dire* that he could be objective although one of his sons was incarcerated at the time of the trial.

(Defendant was represented by Assistant Defender Rebecca Levy, Chicago.)

People v. Evans, 2016 IL App (1st) 142190 (No. 1-14-2190, 12/13/16)

1. The Sixth Amendment right to a public trial extends to *voir dire* of prospective jurors. A violation of the right to a public trial is a structural error which requires automatic reversal without any showing of prejudice. An error may be designated as structural only if it renders the trial fundamentally unfair or unreliable as a means of determining guilt or innocence.

To justify closing a proceeding to the public, there must be an overriding interest that is likely to be prejudiced if the hearing is open, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closure, and the court must make adequate findings to support the closure.

2. Here, defendant's step-grandmother was removed from the courtroom during *voir dire*. The judge stated that because there were 45 prospective jurors there was a shortage of seats in the courtroom, and that it was impossible to separate the grandmother from the prospective jurors.

The Appellate Court assumed that avoiding juror contamination is an overriding interest, but found that excluding the grandmother from the proceedings was not necessary to protect that interest. There was no evidence that the grandmother had attempted or would attempt to communicate with prospective jurors, and defense counsel stated that he had instructed the grandmother not to communicate with the jury pool. Under these circumstances there was no specific threat of jury contamination sufficient to justify closing the proceeding.

The Appellate Court also found that the second reason for barring the grandmother - that there were a limited number of seats available in the courtroom - carried even less weight. Having 45 potential jurors sit in the courtroom at one time is solely a matter of logistics and convenience, and does not affect the fairness of the trial. Many courtrooms are undersized, but "even in a cramped physical space" trial courts can deal with space limitations in ways that do not burden the right to a public trial. For example, potential jurors can be called into the room in smaller groups, the grandmother or a potential juror could have been asked to stand until a seat became available, and the jurors and the grandmother could have been instructed not to interact.

In addition, the trial court failed to make adequate findings to support the closure where it referred only to the small size of the courtroom and made no finding that the grandmother was likely to contaminate

the venire. Although a trivial temporary closure might not violate the Sixth Amendment, the exclusion of the grandmother from the entire jury selection could not be deemed to be trivial.

Defendant's conviction for murder was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Elena Penick, Elgin.)

People v. Gashi, 2015 IL App (3d) 130064 (No. 3-13-0064, 4/7/15)

Trial courts should not attempt to define reasonable doubt for the jury. The concept of reasonable doubt is self-explanatory and needs no further explanation. Providing a definition of reasonable doubt is more likely to confuse a jury than clarify its meaning.

Noting a split among the Illinois Appellate Courts on this issue, the Appellate Court held here that it was structural error under the second prong of plain error for the trial court to tell the jury during *voir dire* that there is no definition of reasonable doubt, so "that is for you [the jury] to decide." Such a statement implies a broad range of meanings for the concept of reasonable doubt, and it is reasonably likely that the jury would overestimate the latitude it had in defining reasonable doubt.

The dissent did not believe that the trial court's comments were erroneous. Nothing in the court's comments created a reasonable likelihood that the jury believed it could convict on anything less than reasonable doubt.

(Defendant was represented by Assistant Defender Mario Kladis, Ottawa.)

People v. Gonzalez, 2011 IL App (2d) 100380 (No. 2-10-0380, 12/7/11)

1. Supreme Court Rule 431(a) provides that the trial court shall conduct *voir dire* examination of prospective jurors, but "may permit the parties to submit additional questions to it for further inquiry . . . and shall permit the parties to supplement the examination by such direct inquiry as the court deems proper . . . depending on the length of examination by the court, the complexity of the case, and nature of the charges." Whether the trial court erroneously denied direct questioning by the parties is reviewed under the abuse of discretion standard.

In determining whether to allow direct questioning by the parties, Rule 431(a) mandates that the trial court consider the length of its own examination of veniremembers, the complexity of the case, and the nature of the charges. Trial courts may not simply dispense with attorney questioning, but after considering the relevant factors may conclude that under the circumstances direct questioning is unnecessary.

2. Here, the trial court erred by disallowing any direct questioning of the venire. There was no indication in the record that the trial court exercised its discretion. Similarly, there was no mention of the complexity of the case, nature of the charges, or length of the court's examination. Furthermore, the case was not "exceedingly simple." The Appellate Court concluded that the trial judge simply decided before *voir dire* to dispense with any direct questioning, informing the parties at one point that "[t]his is the new regime."

3. Because the evidence was closely balanced, the failure to comply with Rule 431(a) was plain error. The court noted that a directed verdict in favor of the defense was granted on one charge at the close of the State's case, the credibility of witnesses was critical in resolving the charges, and notes sent by the jury indicated that it had difficulty deciding the case. Under these circumstances, the refusal to allow direct questioning may have hindered the parties' ability to probe the venire for evidence of bias.

The convictions for aggravated assault of a peace officer and resisting a peace officer were reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Darren Miller, Elgin.)

People v. Graham, 393 Ill.App.3d 268, 913 N.E.2d 99 (1st Dist. 2009)

1. Noting a conflict in authority, the Appellate Court found that the harmless error rule does not apply where the trial court fails to comply with the post-2007 version of Supreme Court Rule 431(b), which requires that even without a defense request the court must question prospective jurors about the presumption of innocence, the reasonable doubt standard, that the defendant need not present evidence, and that the

defendant's failure to testify may not be held against him.

People v. Hill, 402 Ill.App.3d 920, 932 N.E.2d 173 (1st Dist. 2010)

Noting that the issue of whether a violation of amended Supreme Court Rule 431(b) is a second-prong plain error has been the source of divergent opinions from the Appellate Courts, the Third Division of the First District reaffirmed its view that a 431(b) violation is not automatic reversible error.

(Defendant was represented by Assistant Defender Arianne Stein, Chicago.)

People v. Johnson, 408 Ill.App.3d 157, 945 N.E.2d 610 (1st Dist. 2010)

1. At defendant's trial for home invasion and armed robbery, the trial court denied a defense request for supplemental *voir dire* concerning the racial attitudes of the venire. The Appellate Court held that no error occurred.

A. Generally, there is no constitutional right to *voir dire* on matters which might "conceivably prejudice" veniremembers. However, there is a constitutional right to question prospective jurors about their racial views where "special circumstances" create a "constitutionally significant likelihood" that racial prejudice will affect the proceedings. Such "special circumstances" exist where issues of race are "inextricably bound up with the conduct of the trial."

The failure to allow questioning about racial attitudes is constitutional error only if the trial is rendered fundamentally unfair. That the defendant is black and the complainant white is not a "special circumstance" justifying *voir dire* about racial attitudes.

B. The defense argued that racial issues were inherent in this case because defendant was a black man who was married to a white woman and accused of offenses against the boyfriend of his mother-in-law. The court noted that the few references to race in the record were raised by the defense in argument and lacked any evidentiary support. Furthermore, the offenses had no racial component and were motivated by coincidence and opportunity. Under these circumstances, the proposed questioning concerned irrelevant matters and would have injected race into a case which had no other racial content.

The court added that even had the defendant's interracial relationships played an important role in the jurors' ability to be impartial, the proposed supplemental questioning would have been improper because it did not even remotely address such relationships.

2. Under Supreme Court Rule 431(b), the trial court must ask each potential juror whether he or she "understands and accepts" the four **Zehr** principles (the presumption of innocence, the reasonable doubt standard, that the defendant need not offer evidence, and that the defendant's failure to testify cannot be held against him). The trial court violated Rule 431(b) when it omitted any reference to the fourth principle from its questioning, collapsed the first three principles into a single question, and failed to determine whether the jurors understood and accepted the first three principles.

Defense counsel failed to preserve the issue, however, and the plain error rule did not apply. First, the court found that the evidence was not closely balanced. Second, the trial court employed a "highly cooperative and transparent approach" to *voir dire*, encouraging the parties to remind him of any omissions during the process. Thus, the judge would likely have been responsive to a defense objection had one been raised.

(Defendant was represented by Assistant Defender Stephanie Fisher, Chicago.)

People v. Jones, 2014 IL App (1st) 120927 (No. 1-12-0927, 3/24/14)

1. The Sixth Amendment guarantee to a public trial is designed for the protection of the accused, and is intended to: (1) ensure a fair trial; (2) encourage the prosecution and trial court to carry out their duties responsibly; (3) encourage witnesses to come forward; and (4) discourage perjury. The right to a public trial includes the right to a public *voir dire*.

The right to a public trial is not absolute, however, and can be infringed when necessary. In addition, a temporary closure may be so trivial that it does not violate the Sixth Amendment. This "triviality standard"

is not a harmless error analysis, however. Instead, it examines the trial court's actions and the effects of the closure to determine whether Sixth Amendment protection was denied.

2. Plain error did not occur where *voir dire* of three veniremembers occurred in chambers, outside the presence of the public and the defendant. First, Supreme Court Rules 431 and 234 grant the trial court discretion to conduct *voir dire* outside the presence of other jury members. Second, because access to *voir dire* was not requested by defendant, the news media, or the public, the procedure merely prevented other members of the *voir dire* panel from hearing the responses. The right to a public trial does not require that all veniremembers hear other veniremembers' answers.

The court also noted that one of the prospective jurors requested an *in camera* discussion, and there was nothing in the record to indicate that the trial was in any way unfair due to the brief *in camera* questioning, especially since all three of the prospective jurors questioned *in camera* were excused from the jury. Because any closure was trivial, no Sixth Amendment violation occurred.

3. The court rejected defendant's argument that he was not required to object in order to avoid waiving any issue concerning the *voir dire*. United States Supreme Court case law holds that where the defendant objects in the trial court to the closure of a trial, the court must consider alternatives to closure even where neither party offers any alternatives. Where there is no objection to the closure, however, the issue is forfeited.

Defendant's conviction for first degree murder was affirmed.

(Defendant was represented by Assistant Defender James Morrissey, Chicago.)

People v. Luna, 409 Ill.App.3d 45, 946 N.E.2d 1102 (1st Dist. 2011)

1. An instruction on a lesser offense is justified where there is credible evidence to support the giving of the instruction. Where there is evidentiary support for an instruction, the failure to give the instruction constitutes an abuse of discretion.

The court rejected the State's argument that a defendant who raises self-defense cannot seek an involuntary manslaughter instruction, because raising self-defense admits an intentional killing while involuntary manslaughter requires an unintentional killing by reckless actions that are likely to cause death or great bodily harm. Because Illinois law allows a criminal defendant to raise inconsistent defenses, the inconsistency between the mental states does not preclude either claim.

2. However, a defendant may not seek to reduce a first degree murder conviction to involuntary manslaughter based on a claim that he acted with a subjective intent that is not supported by any evidence other than the defendant's testimony. "Illinois courts have consistently held that when the defendant intends to fire a gun, points it in the general direction of his or her intended victim, and shoots, such conduct is not merely reckless and does not warrant an involuntary-manslaughter instruction, regardless of the defendant's assertion that he or she did not intend to kill anyone." (**People v. Jackson**, 372 Ill.App.3d 605, 874 N.E.2d 123 (4th Dist. 2007)). Because the evidence here unequivocally demonstrated that defendant intended to swing a knife in the decedent's direction, and other than defendant's testimony there was no evidence that he merely intended to scare the decedent, an involuntary manslaughter instruction was not justified.

3. In **People v. Thompson**, 238 Ill.2d 598, 939 N.E.2d 403 (2010), the Supreme Court held that the trial court's failure to comply with Supreme Court Rule 431(b), which requires that the judge ascertain that jurors understand and accept four basic legal principles, satisfies the "fundamental error" prong of the plain error rule only if the defendant shows that the error resulted in a biased jury being impaneled. However, **Thompson** left open the issue whether Rule 431(b) violations could be plain error under the "closely balanced evidence" test.

Here, even if the evidence was closely balanced, defendant could not show prejudice from the trial court's failure to ensure that the venire understood and accepted the principle that no consideration could be given to a defendant's decision not to testify. Because the defendant did testify, the court concluded that he could not carry his burden of persuasion concerning plain error.

(Defendant was represented by Assistant Defender Julianne Johnson, Chicago.)

People v. Madrid, 395 Ill.App.3d 38, 916 N.E.2d 1273 (1st Dist. 2009)

The harmless error rule does not apply where the trial court fails to comply with the post-2007 version of Supreme Court Rule 431(b), which requires the trial court to question prospective jurors about their understanding and acceptance of the presumption of innocence, the reasonable doubt standard, the principle that the defendant need not present evidence, and the principle that the defendant's failure to testify may not be held against him. The trial court failed to satisfy Rule 431(b) where it addressed the above principles but failed to ask the veniremembers, either individually or as a group, whether they accepted those principles.

(Defendant was represented by Assistant Defender John Koltse, Chicago.)

See also, **People v. Arredondo**, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2009) (No. 1-07-2825, 10/8/09) (trial court failed to question veniremembers about their understanding and acceptance of Rule 431(b) principles).

(Defendant was represented by Assistant Defender Jean Park, Chicago.)

People v. McCovins, 2011 IL App (1st) 081805 (No. 1-08-1805, 9/1/11)

Supreme Court Rule 431(b) requires the trial court to ask each potential juror, individually or in a group, whether he or she understands and accepts several principles including the presumption of innocence, the reasonable doubt standard, that the defendant need not offer any evidence, and that the defendant's failure to testify cannot be held against him. Rule 431(b) requires that the method of inquiry provide an opportunity for each juror to respond to specific questions concerning his or her acceptance and understanding of these principles.

The Appellate Court concluded that the trial judge violated Rule 431(b) where he provided veniremembers with broad statements of legal principles, along with commentary on courtroom procedure and the trial schedule, and then asked whether any potential jurors "cannot abide by any or some or all of the principles I just talked about." The court concluded that such a general question failed to comply with Rule 431(b)'s requirement that each juror be afforded an opportunity to indicate his or her agreement or disagreement with the four principles concerning which admonitions are required.

The court noted, however, that defendant failed to preserve the issue. Because the evidence was not closely balanced, the court concluded that the plain error rule did not apply.

(Defendant was represented by Assistant Defender David Harris, Chicago.)

People v. Mueller, 2015 IL App (5th) 130013 (No. 5-13-0013, 7/17/15)

The trial court violated Supreme Court Rule 431(b) by failing to properly voir dire the potential jurors about the four **Zehr** principles. The court asked if the potential jurors *understood* that defendant was presumed innocent, did not have to present any evidence, and that his failure to testify could not be used against him. But the court never asked the jurors if they *accepted* any of these principles. The court also asked the potential jurors if they would require the State to prove defendant guilty beyond a reasonable doubt, but did not ask if they understood this principle.

Although defendant failed to object to the court's voir dire, the Appellate Court addressed the issue as plain error since the evidence was closely balanced. Reversed and remanded for a new trial.

(Defendant was represented by Assistant Defender Chris Kopacz, Chicago.)

People v. Owens, 394 Ill.App.3d 147, 914 N.E.2d 1280 (4th Dist. 2009)

1. Plain error occurred (under the "fundamental fairness" prong of the plain error rule) where the trial court failed to comply with Supreme Court Rule 431(b) by questioning individual veniremembers concerning four principles: (1) the presumption of innocence, (2) that defendant was not required to offer evidence, (3) that defendant's failure to testify could not be considered in reaching a verdict, and (4) that the State has the burden of proof beyond a reasonable doubt. Although the trial judge reviewed these principles with the entire venire before selecting prospective jurors, the purpose of individual questioning is to disclose jurors who are

biased against such basic principles and unlikely to change their views based on a mere instruction. The court concluded that the failure to comply with Rule 431(b) created "a complete breakdown of the judicial process that undermines this court's confidence in the jury's verdict."

2. Because the trial court failed to question any of the veniremembers about any of the four principles under Rule 431(b), the court rejected the argument that the error was harmless. The court distinguished **People v. Stump**, 385 Ill.App.3d 515, 896 N.E.2d 904 (4th Dist. 2008), in which the trial court questioned veniremembers about two of the applicable principles, defense counsel questioned more than half of the jurors about the remaining two principles, and the evidence of guilt was overwhelming. Here, none of the veniremembers were questioned, and the failure to conduct the questioning may have contributed to the verdict.

Defendant's convictions were reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

See also, People v. Blair, 395 Ill.App.3d 465, 917 N.E.2d 43 (2d Dist. 2009) (Rule 431(b) requires the trial court to ensure that all jurors understand and accept the four principles set forth in the rule; plain error occurred where the trial court questioned the jurors about the four principles outlined in Rule 431(b) but failed to give some of the veniremembers an opportunity to respond whether they understood and accepted *all* of those principles).

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

People v. Richardson, 2013 IL App (1st) 111788 (No. 1-11-1788, 11/13/13)

Supreme Court Rule 431(b) requires the trial court to ask potential jurors whether they both understand and accept certain specified principles pertaining to criminal trials. It is not sufficient for the court to make an inquiry that ascertains only that the jurors accept the principles. The court must also determine that the jurors understand the principles.

The court's inquiry whether the jurors had "any quarrel with" the principles specified in Rule 431(b) determined only that the jurors accepted the principles. The inquiry violated Rule 431(b) because it allowed jurors to decide the case although they may not have understood that they must presume the defendant innocent and that the defendant has no obligation to testify or offer any evidence on her behalf.

This Appellate Court noticed this error under the closely-balanced-evidence prong of the plain error rule.

Mason, J., dissented.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

People v. Sanders, 393 Ill.App.3d 152, 911 N.E.2d 1096 (1st Dist. 2009)

People v. Strain, 194 Ill.2d 467, 742 N.E.2d 315 (2000), which provides that a trial judge must inquire about the potential gang bias of veniremembers where gang related evidence is integral at trial, constituted a "new" rule of law which could not be applied retroactively on collateral review. Furthermore, a post-conviction petition filed the year after **Strain** was decided, but eight years after defendant was convicted, was untimely.

The Appellate Court acknowledged that its rulings conflicted with **People v. Gardner**, 331 Ill.App.3d 358, 771 N.E.2d 26 (1st Dist. 2002), which held that a defendant could obtain retroactive relief on a post-conviction petition based on **Strain** although the ordinary statutory period for filing such a petition had expired. The Appellate Court stated "that as much as we respect the opinions of the **Gardner** court we cannot align ourselves with its analysis on these matters."

(This summary was written by Deputy State Appellate Defender Daniel Yuhas.)

People v. Short, 2014 IL App (1st) 121262 (No. 1-12-1262, mod. op. 12/3/14)

At defendant's trial for attempt first degree murder, unlawful possession of a firearm by a gang member, aggravated unlawful use of a weapon, and aggravated battery with a firearm, the trial court

admonished the venire that evidence of gang membership might be presented and asked whether the veniremembers would be able to afford defendant a fair trial in light of such testimony. After the jury was selected, defendant pleaded guilty to unlawful possession of a firearm by a gang member - the only charge to which the gang membership evidence was relevant - and aggravated unlawful use of a weapon. The trial court denied defense counsel's request to have the venire dismissed and a new jury selected, but informed the jury that contrary to the earlier statements no gang evidence would be presented.

The court concluded that the trial court did not err during *voir dire* by informing the jury that gang membership evidence might be introduced. At that point, defendant had not expressed a willingness to plead guilty to unlawful possession of a firearm by a gang member, and had merely unsuccessfully sought to have a bench trial on that charge. Thus, the trial court admonished the venire in accordance with its reasonable expectation that gang-related evidence would be presented. Once defendant pleaded guilty to the only charge on which such evidence could have been admitted, the judge properly instructed the jury that despite the earlier statements, no gang evidence would be presented.

The court added that even if the trial court erred, defendant was not prejudiced. A defendant facing charges that require evidence of gang membership is entitled to have the jury questioned during *voir dire* to determine if he will be prejudiced by admission of such evidence. **People v. Thompson**, 2013 IL App (1st) 113105. Here defense counsel was satisfied after *voir dire* that the jurors would not hold evidence of gang membership against defendant. There is no basis to argue that the jury could no longer be fair and impartial after it was told that gang evidence would not be presented.

Although defendant speculated that the jury would likely assume that he was guilty of the charges that were dropped, the court found that it is "[e]qually possible that the jury assumed the State dropped the charges because it would not be able to prove them." The court also noted that the jury acquitted defendant of attempt first degree murder and convicted only on a lesser charge, further establishing that it was likely not affected by the trial court's reference to gang evidence.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Jessica Ware, Chicago.)

People v. Vesey, 2011 IL App (3d) 090570 (No. 3-09-0570, 9/27/11)

Supreme Court Rule 431(b) requires that the court ask each potential jury whether the juror understands and accepts four principles: (1) the defendant is presumed innocent; (2) the State is required to prove defendant's guilt beyond a reasonable doubt for the jury to convict; (3) the defendant is not required to offer any evidence at trial; and (4) the jury cannot hold the defendant's failure to testify against him.

Plain error occurred where the court failed to question all of the jurors about each of these principles. The evidence was closely balanced, as there was no corroborating evidence of guilt, and the trial largely came down to the credibility question of a correctional officer's word against the defendant's.

(Defendant was represented by Panel Attorney Ron Dolak, Geneva.)

People v. Walker, 403 Ill.App.3d 68, 932 N.E.2d 1115 (1st Dist. 2010)

The trial judge failed to ask the jurors if they understood and accepted the principle that the defendant was not required to offer any evidence on his own behalf. The Appellate Court concluded that because defendant did testify and offer evidence on his behalf, the court's noncompliance with Rule 431(b) did not deprive defendant of a fundamental right or affect the integrity of the judicial process such that the violation could be noticed as plain error. The court opined that a bright-line rule that presumes noncompliance with Rule 431(b) automatically deprives the defendant of a fair trial would elevate form over substance.

(Defendant was represented by Assistant Defender Michael Orenstein, Chicago.)

People v. Wallace, 402 Ill.App.3d 774, 932 N.E.2d 635, 2010 WL 2780644 (5th Dist. 2010)

1. Supreme Court Rule 431(b) requires the trial court to question each veniremember individually

or in a group concerning four basic principles, and to provide to each juror an opportunity to respond to specific questions concerning those principles. The court acknowledged that in **People v. Wheeler**, ___ Ill.App.3d ___, 927 N.E.2d 829 (1st Dist. 2010) (No. 1-08-1370, 3/31/10), the First District found that the venire was denied a timely opportunity to respond to specific questioning. In **Wheeler**, the trial court gave a narrative of the four principles, but interjected a lengthy recitation on other matters before questioning the venire about the Rule 431(b) principles.

Here, unlike **Wheeler**, the only discussion between the announcement of the four principles and the questioning of the venire concerned whether any prospective jurors had prior knowledge of the case. Because only a short period of time elapsed between the pronouncement of the principles and the questioning, Rule 431(b) was not violated.

2. The trial court did not err by conducting the Rule 431(b) questioning in groups of veniremembers rather than individually. Rule 431(b) does not require individual questioning of veniremembers, and specifically permits jurors to be questioned "individually or in a group."

(Defendant was represented by Assistant Defender Paige Strawn, Mt. Vernon.)

People v. Wheeler, 399 Ill.App.3d 869, 927 N.E.2d 829 (1st Dist. 2010)

1. Supreme Court Rule 431(b) requires the trial court to question prospective jurors about the presumption of innocence, the reasonable doubt standard, that defendant need not offer evidence, and that defendant's failure to testify cannot be held against him. The method of questioning employed by the judge must afford each juror an opportunity to respond to specific questions about these principles.

2. To satisfy Rule 431(b), the trial court's remarks explaining the above principles must be "timely connected" to the veniremembers' opportunity to respond. The trial court failed to comply with Rule 431(b) concerning nine jurors where it explained the four principles covered by the rule, explained several other points not covered by Rule 431(b), and only then asked whether the venire agreed with the "principles of law I described earlier." Because some 15 pages of transcript intervened between the trial court's explanation of the principles and the veniremembers' chance to respond, the opportunity to respond was not "timely connected" to the judge's explanation.

3. The court acknowledged that five jurors were given a timely opportunity to respond to specific questions regarding the presumption of innocence and burden of proof. Because those jurors were never asked specific questions concerning the remaining two principles, however, Rule 431(b) was violated.

4. Noting a conflict in authority, the court concluded that a violation of Rule 431(b) does not constitute such a serious error as to automatically require reversal under the second prong of the plain error rule. The court found that the reasoning of **People v. Glasper**, 234 Ill.2d 173, 917 N.E.2d 401 (2009), which dealt with the failure to comply with a version of Rule 431(b) which required such questioning only if requested by the defense, applies to violations of the current version of Rule 431(b).

(Defendant was represented by Assistant Defender Adrienne River, Chicago.)

People v. Willhite, 399 Ill.App.3d 1191, 927 N.E.2d 1265 (4th Dist. 2010)

Under Supreme Court Rule 431(b), the trial court is required to ask each potential juror whether he or she understands and accepts several principles, including the presumption of innocence, the reasonable doubt standard, that the defendant is not required to offer evidence, and that the failure to testify cannot be held against the defendant. The method of inquiry may be "individually or in a group," but must provide an opportunity for each veniremember to respond to specific questions about the principles.

The court concluded that Rule 431(b) does not require that jurors be questioned individually about each principle, or that the trial court receive individual answers. Furthermore, the judge may elect to delay the Rule 431(b) questioning until the parties have conducted questioning and exercised any challenges.

Thus, the trial court did not err by addressing only the jurors who had been accepted by the parties, in groups of four, about the 431(b) principles. The court stressed that the group questioning did not discourage venirepersons from expressing their lack of understanding or agreement with any of the

principles. Furthermore, because the jurors had not yet been sworn to serve, a potential juror who indicated a problem with any of the principles could be questioned further and excused if necessary.

Defendant's convictions for possession with intent to deliver were affirmed.

(Defendant was represented by Assistant Defender Jackie Bullard, Springfield.)

People v. Wrencher, 399 Ill.App.3d 1136, 929 N.E.2d 1124 (4th Dist. 2010)

People v. Glasper, 234 Ill.2d 173, 917 N.E.2d 401 (2009), addressed the pre-amended version of Supreme Court Rule 431(b), which required that the trial court, on request, question jurors regarding their understanding and acceptance of certain constitutional principles. The Illinois Supreme Court held that the court's failure to conduct the questioning, where it had not been requested by the defense, was not *per se* prejudicial error requiring automatic reversal.

In a modified opinion entered on denial of rehearing, the Appellate Court addressed the impact of the **Glasper** decision on a violation of the amended version of Rule 431(b), which imposes a *sua sponte* duty on the trial judge to question jurors' regarding their understanding and acceptance of the constitutional principles. **Glasper** stated its decision would not necessarily apply to this amended version of the rule. Nonetheless, the Appellate Court held that changing the rule to make the obligation automatic, rather than dependent on defendant's request, made no qualitative difference. The source of the obligation and the nature of the violation remained the same.

The Appellate Court affirmed, finding that the violation of Rule 431(b) was not plain or structural error, and was harmless because no rational juror could have acquitted the defendant.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

People v. Yusuf, 399 Ill.App.3d 817, 928 N.E.2d 143 (4th Dist. 2010)

The trial court's failure to comply with the amended version of Supreme Court Rule 431(b), which requires questioning of prospective jurors concerning four basic principles (the presumption of innocence, the reasonable doubt standard, that defendant is not required to offer evidence, and that defendant's failure to testify cannot be held against him) constituted plain error because defendant was denied a fundamentally fair trial. Although the trial court advised the veniremembers *en masse* concerning the four principles, it failed to specifically question each juror about his or her understanding and acceptance of those principles. Furthermore, neither party cured the trial court's omission by conducting such questioning during *voir dire*.

The court acknowledged that in **People v. Glasper**, 234 Ill.2d 173, 917 N.E.2d 401 (2009), the Supreme Court refused to find that a Rule 431(b) violation was *per se* reversible error. The court noted, however, that **Glasper** was expressly limited to the pre-amended version of Rule 431(b), which required questioning only upon a defense request.

(Defendant was represented by Assistant Defender John McCarthy, Springfield.)

Top

§32-4(b)
Exclusion of Jurors Based on Race or Sex

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) Racial discrimination in the jury selection process violates equal protection.

Miller-El v. Dretke, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) The petitioner, who had been convicted of capital murder, was entitled to *habeas* relief on **Batson** grounds. The 108-person venire for defendant's trial contained 20 African-American veniremembers, only one of whom served on the jury. Nine of the African-Americans were struck for cause or by agreement, while 10 were excused by the prosecution's

use of peremptories. In finding that the petitioner had established that the prosecution's use of peremptories was racially motivated, the court utilized a "side-by-comparison" of African-Americans who were struck and white veniremembers who served. The court concluded that a discriminatory intent was shown because in several instances, the prosecutor's reasons for striking black panelists applied equally to non-blacks who were permitted to serve. The court also noted that the prosecutor's failure to ask followup questions of black jurors concerning its claimed concerns made its assertions of race-neutral reasons less credible. In addition, the State asked different *voir dire* questions to black and non-black veniremembers, giving the former a description of the death penalty which was apparently intended to elicit an unfavorable reaction to the possibility of a death sentence, and asking a question "which might fairly be called trickery" and which appeared to have been intended to elicit a justification for use of a peremptory. Finally, for decades before defendant's trial, prosecutors in the county had systematically excluded blacks from juries. The prosecutor's office had adopted a manual which recommended excluding minorities from juries, and the prosecutors in this case marked the race of each prospective juror on his or her juror card. When the evidence "is viewed cumulatively its direction is too powerful to conclude anything but discrimination".

Georgia v. McCollum, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992) A *defendant's* exercise of peremptory challenges in a racially discriminatory manner is "State action" for purposes of the Equal Protection Clause - peremptory challenges are creations of state law and the peremptory challenge and jury systems could not exist without governmental participation. A defendant's exercise of peremptory challenges in a racially discriminatory manner violates equal protection for the same reasons as does the prosecution's racial exercise of such challenges.

Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) A criminal defendant has standing to raise a **Batson** objection even if he is not of the same race as the excluded jurors. See also, **People v. Holman**, 169 Ill.2d 356, 647 N.E.2d 960 (1995).

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) The Court extended **Batson** to prohibit exercising peremptories on the basis of gender. The practice of discriminating by gender does not further the State's legitimate interest in achieving a fair and impartial trial, and therefore does not satisfy the "heightened scrutiny" standard applied to gender-based classifications. Gender is an inaccurate basis on which to predict a juror's likely attitude and such arguments "condone the same stereotypes" previously used to justify the "wholesale exclusion of women from juries and the ballot box."

Ham v. South Carolina, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973) State trial judge, upon timely request by defendant, was required to *voir dire* jurors on subject of racial prejudice. See also, **Turner v. Murray**, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986) (trial court must allow questioning concerning racial prejudice where there are "special factors" suggesting that racial prejudice may affect the trial).

Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975) A state statute which excluded women from jury service, unless they had previously filed a written declaration of their desire to serve, violated the fair cross-section requirement of the Sixth Amendment. However, there is no requirement that the petit jury actually chosen must mirror the community and reflect various distinctive groups in the population. Thus, a defendant is not entitled to a jury of a particular composition. See also, **Teague v. Lane**, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); **People v. Saunders**, 187 Ill.App.3d 734, 543 N.E.2d 1078 (2d Dist. 1989).

Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979) State statute that automatically exempted women from jury duty upon their request violated the fair cross-section requirement of the Sixth Amendment.

People v. Simms, 168 Ill.2d 176, 659 N.E.2d 922 (1995) Defense counsel made an oral motion to challenge the jury panel because it contained no African-Americans. To make a *prima facie* showing of racial discrimination the defense must establish that: (1) the group excluded from the panel is a "distinctive" group in the community, (2) the group's representation in the venire is not "fair and reasonable" as compared with its representation in the community, and (3) the under representation is due to "the group's systematic exclusion" from the jury-selection process. The Court concluded that since African-Americans comprise only 2% of DuPage County's population, it is "fair and reasonable" to expect some venires will lack any black members. Defendant also failed to introduce evidence suggesting that the absence of African-Americans from the venire was due to systematic exclusion from the selection procedure. See also, **People v. Fomond**, 273 Ill.App.3d 1053, 652 N.E.2d 1322 (1st Dist. 1995).

People v. Free, 112 Ill.2d 154, 492 N.E.2d 1269 (1986) Defendant alleged that he had been denied a fair jury because of discriminatory housing practices in his county. In an unrelated case, a federal court had held that the county engaged in discriminatory zoning practices that barred minorities and lower-income groups from establishing residences in the county. The Supreme Court stated that "while courts can in no way condone discriminatory housing practices, such practices are not constitutional cause for reversing convictions of all defendants tried by juries during the existence of the housing practices. In a criminal proceeding an accused has the constitutional right only to a venire drawn from a fair cross-section of the community."

People v. Johnson, 114 Ill.2d 170, 499 N.E.2d 1355 (1986) Prior to his trial in Will County, the defendant moved for a change of place of trial due to extensive publicity. The trial judge moved the trial to Iroquois County. Defendant then objected to trial in Iroquois County based on a lack of racial diversity. Iroquois County has a white population of 95.5%, whereas Will County's white population is about 90%. The Court rejected the defendant's claim holding that a requirement that the venire of the transferee county proportionately mirror any distinctive groups found in the originating county would saddle the judiciary with an onerous, if not impossible, task and effectively grant defendants a heretofore unrecognized right to choose their place of trial.

People v. Rivera, 227 Ill.2d 1, 879 N.E.2d 876 (2007) A trial court may raise a **Batson** claim *sua sponte* only if a *prima facie* case of discrimination is abundantly clear. When a court acts *sua sponte*, it must make an adequate record of all the relevant facts, and must articulate a basis for its belief that a *prima facie* case of discrimination has been shown. Where the trial court raises a **Batson** violation *sua sponte*, a bifurcated standard of review applies. The trial court's findings of fact, including any observations made on the record concerning demeanor and credibility, are accepted unless they are contrary to the manifest weight of the evidence. However, the ultimate legal determination based on such findings is reviewed *de novo*. Here, the trial court stated that it believed that defendant had improperly exercised peremptories based on gender. The following factors are pertinent to a claim of gender discrimination in jury selection: (1) gender identity between the party exercising the peremptory and the excluded venirepersons; (2) the pattern of peremptory strikes; (3) a disproportionate use of peremptory challenges against female venirepersons; (4) the level of female representation in the venire as compared to the jury; (5) the questions and statements of the challenging party; (6) whether the excluded venirepersons were a heterogeneous group sharing gender as their only common characteristic; and (7) the gender of the defendant, victim and witnesses. In this case no *prima facie* case of discrimination was shown by either the number of peremptories exercised against female veniremembers or the "nature of the questions" which defense counsel asked. The court also noted that the judge did not make any on-the-record observations concerning counsel's demeanor or conduct which caused the judge to believe that peremptories were being exercised improperly. Because there was no basis in the record to support a *prima facie* case of racial discrimination, defendant was improperly denied the use of a peremptory challenge. However, the improper denial of a peremptory challenge is harmless if the evidence, as it was in this prosecution, is so overwhelming that no rational jury could have acquitted.

People v. Hollins, 366 Ill.App.3d 533, 852 N.E.2d 414 (3d Dist. 2006) The defendant was denied due process and equal protection when the jury commissioner manipulated the jury pool so that 16 of the first 18 veniremembers examined during jury selection were members of minority groups, but only two minority veniremembers were included in the remainder of the jury pool. The court concluded that because the jury coordinator removed 14 Caucasians who had been randomly assigned to defendant's jury pool, and because representation of Caucasians on defendant's jury panel was 20% less than the county's Caucasian population, an equal protection violation was shown. The court also found that due process is violated by *any* intentional manipulation of the jury pool on the basis of race. "Regardless of whether it was one individual from traditionally under represented groups that was arbitrarily excluded or in the alternative, the entire group we simply can not allow such prejudicial conduct to invade the courtrooms, where due process guarantees all persons the right to a fair trial in a fair tribunal."

Top

§32-4(c)
"Batson" Hearings

§32-4(c)(1)
Generally

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) The Court rejected the rule that to establish an equal protection violation based upon the State's exclusion of prospective black jurors by peremptory challenge, the defendant must prove repeated striking of blacks in a number of cases. Instead, a defendant may make a *prima facie* showing of purposeful racial discrimination in selection of the jury by relying solely on the facts in his own case. To establish a *prima facie* case of purposeful discrimination, the defendant must show that "he is a member of a cognizable racial group" and that the prosecutor used "peremptory challenges to remove from the venire members of the defendant's race." The defendant "is entitled to rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate." Finally, the defendant must show that "these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." Once the defendant makes a *prima facie* showing, the State must "come forward with a neutral explanation for challenging black jurors." The prosecutor's explanation "need not rise to the level justifying exercise of a challenge for cause," but it is not sufficient rebuttal for the prosecutor to state that the prospective jurors were challenged "on the assumption - or his intuitive judgment - that they would be partial to the defendant because of their shared race." See also, **People v. McDonald**, 125 Ill.2d 182, 530 N.E.2d 1351 (1988).

Johnson v. California, 545 U.S.162, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005) A three-step process is used to resolve claims under **Batson**. First, the defendant must make a *prima facie* case by showing that the relevant facts give rise to an inference that the prosecutor exercised peremptories with a discriminatory purpose. Once the defendant has made a *prima facie* case, the burden shifts to the prosecution to explain its peremptories with permissible, race-neutral justifications. If the prosecution tenders race-neutral explanations, the trial court must decide whether the defendant has proven intentional racial discrimination. Although states have flexibility in formulating procedures to comply with **Batson**, the court concluded that California improperly required that at the first stage, the defendant was required to show that racial motivation was "more likely than not." It is not until the third stage, at which point the trial judge has the benefit of both the defendant's allegations and the prosecutor's explanations, that the judge must determine whether an improper motivation was "more likely than not."

Snyder v. Louisiana, 552 U.S. 472, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) The prosecution claimed that it exercised a peremptory against an African-American veniremember who was a student teacher because it feared that he might accept a verdict to a lesser charge to avoid missing school for death penalty deliberations. The prosecutor also stated this veniremember appeared to be "very nervous." The trial court upheld the peremptory but the Supreme Court reversed. Although deference to the trial judge's ruling is especially appropriate where that ruling is based upon the veniremember's demeanor, the record did not show that the trial court made a demeanor-based determination. The prosecutor's second reason for the peremptory - the veniremember's student teaching obligation - "fails even under the highly deferential standard of review applicable here." Although the veniremember initially expressed concern about missing his student teaching obligations, he expressed no further concern after the clerk contacted the Dean of the College and learned that any time missed could be made up. The prosecutor's belief that the veniremember would accept a lesser verdict to shorten the proceedings was "highly speculative." The court noted that if most of the jury favored a death sentence, a juror who wanted to shorten deliberations would do the same. Finally , the prosecutor accepted two Caucasian jurors who had conflicting obligations at least as serious as being a student teacher.

Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) A criminal defendant has standing to raise a **Batson** objection even if he is not of the same race as the excluded jurors. See also, **People v. Coleman**, 155 Ill.2d 507, 617 N.E.2d 1200 (1993).

People v. Munson, 171 Ill.2d 158, 662 N.E.2d 1265 (1996) Defendant claimed that the State violated **Batson** by excluding two black veniremembers. Under **Batson** the objecting party must make a *prima facie* showing that the prosecutor exercised peremptory challenges based on race. If that burden is satisfied, the opposing party has the burden of articulating a race-neutral explanation for the peremptory. A race-neutral explanation is one based upon something other than race, and is to be judged based on its *facial* validity. Thus, the explanation given at this stage need not be persuasive or even plausible; it need only be race-neutral. The trial court must make a factual finding as to whether a party used a peremptory challenge to discriminate. Because such a finding is based in large part on credibility, the trial court's finding is afforded great deference. Here, the trial court found a *prima facie* case of racial discrimination as to the exclusion of two jurors but then held that neither exclusion was racially motivated. The Supreme Court upheld the exclusions. First, the prosecutor could properly excuse a venireperson in the belief that she knew him from some other case. Second, one of the veniremembers could legitimately have been excused because he hesitated when asked whether he could sign a guilty verdict, The Court has frequently approved peremptory challenges based on courtroom conduct or demeanor. Finally, the trial judge's finding that the *prima facie* case had been rebutted was supported where the key witnesses were black, two black jurors sat on the jury and the State had no motive to exclude black jurors.

People v. Hope, 168 Ill.2d 1, 658 N.E.2d 391 (1995) The Court stressed that **Batson** involves a three-step procedure. First, the objecting party must make a *prima facie* showing of racial exclusion. Second, the opposing party has the burden to articulate a race-neutral explanation for the strikes. Third, the trial court must determine whether, in view of the explanation and the other circumstances, the objecting party has established purposeful discrimination. At the second step of the procedure, a sufficiently race-neutral explanation is given where the striking party gives an explanation based on something other than race. The only question at the second stage is whether the explanation is valid *on its face*, and not whether it is "persuasive" or "plausible." (See, **Purkett v. Elem**, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995)). The "plausibility" or "persuasiveness" of the explanation is at issue at the third stage and the burden of proof is on the *objecting* party. Here, the State offered a sufficiently race-neutral reason to require the court to proceed to the third stage. The prosecutor claimed that the juror in question had been excluded because her "background" (including her occupation as a freelance writer, her residence in Hyde Park, and her

membership in the Buddhist faith) made her the kind of juror the State did not want. None of the State's reasons for exclusion were inherently discriminatory, and the trial judge is in the best position to assess the answers given by potential jurors and the credibility of the prosecutor. In addition, whether the juror could be excluded based upon her Buddhist faith was a moot question because at least two of the reasons given by the State (her occupation and area of residence) were race-neutral.

People v. Houston, 229 Ill.2d 1, 890 N.E.2d 424 (2008)Although defense counsel acted improperly by waiving the presence of a court reporter during *voir dire*, counsel was not ineffective where the defendant could not establish that the result of the trial would have been different had a court reporter been present. The court remanded the cause for reconstruction of the *voir dire*, and concluded that the bystander's report failed to show a *prima facie* case of discrimination under **Batson**. In addition, even if a *prima facie* case had been shown, the State would have been able to articulate race neutral reasons for excusing the only African-American veniremember against whom it exercised a peremptory.

People v. Blackwell, 177 Ill.2d 338, 665 N.E.2d 782 (1996) The State exercised 15 of its 17 peremptory challenges to exclude women from the venire. Four of the excluded venirewomen were black, and defendant raised a **Batson** objection. The prosecutor responded to the objection by saying he had excluded potential jurors on the basis of gender, because he was concerned about potential sympathy for defendant's mother. While the direct appeal was pending, the Supreme Court issued **J.E.B. v. Alabama ex rel. T.B.**, which held that peremptory challenges may not be exercised on the basis of gender. The Illinois Supreme Court found that the defendant had established a *prima facie* case of gender discrimination, and remanded the cause for a hearing at which the State could present gender neutral reasons for its peremptory challenges. On remand the prosecutor claimed that the State had selected the jury under the theory that veniremembers fall into two categories: "proactive" and "reactive." The prosecution believed that "proactive" jurors are leaders, good communicators and more aggressive, and it did not want too many of them on the jury. The trial court found that no constitutional violation had occurred but the Supreme Court disagreed. The Court held that the State's professed "proactive" strategy, had it been applied consistently, would have been a gender-neutral strategy. However, the record showed that the State applied the "proactive" theory only to the selection of women, and that "proactive" men were permitted to remain on the jury.

People v. Pecor, 153 Ill.2d 109, 606 N.E.2d 1127 (1992) Defendant raised a **Batson** objection to the State's use of peremptories to excuse one white and four black veniremen. Following then-current Illinois law, the trial court ruled that a white defendant could not challenge the exclusion of black jurors. While the case was on appeal, the United States Supreme Court held that a defendant of one racial background has standing to challenge the State's use of peremptories to excuse veniremen of a different race (**Powers v. Ohio**). In the Supreme Court, the State contended that although at the time of trial defendant had no standing to raise a **Batson** challenge, he should have made a record in the hope that the law might eventually change. The Supreme Court found that valuable time and judicial resources would be wasted if parties were required to make full records despite their lack of standing to raise an issue, and a defendant who lacks standing cannot be required to anticipate that the law might change.

People v. Fair, 159 Ill.2d 51, 636 N.E.2d 455 (1994) The Court found that defense counsel waived any **Batson** challenge by not objecting until the jury had been sworn, both parties had given opening statements, and three State witnesses had testified. Acceptance of an impaneled jury implicitly shows satisfaction with the jurors, and a defendant "cannot wait until the trial is well under way before objecting to the jury composition." See also **People v. Andrews**, 132 Ill.2d 451, 548 N.E.2d 1025 (1989).
People v. Mack, 128 Ill.2d 231, 528 N.E.2d 1107 (1989) A defendant is not entitled to production of the prosecutor's *voir dire* notes at a **Batson** hearing. Such notes come within the protections of the work-product doctrine (Supreme Court Rule 412(j)(i)).

People v. Young, 128 Ill.2d 1, 538 N.E.2d 453 (1989) At a **Batson** hearing, the prosecutor's statement of reasons for exercising peremptory challenges need not be given under oath and subject to cross-examination.

People v. Morales, 308 Ill.App.3d 162, 719 N.E.2d 261 (1st Dist. 1999) The Court found pretextual the prosecution's claim that it challenged an African-American veniremember because she was a salesperson who worked on commission and might be inattentive because she was hesitant about missing work. Although concerns about the possibility of losing income may constitute a race-neutral reason for exclusion, the explanation was pretextual because it was not applied consistently to a white juror who was accepted despite concerns that serving would interfere with his last semester of college. But see, **People v. Easley**, 192 Ill.2d 307, 736 N.E.2d 975 (2000) (because in many cases a peremptory challenge is based on a combination of traits, purposeful discrimination is not established merely because an excluded venireperson shared a characteristic with a juror who was not challenged). The State also acted improperly be excusing a Hispanic veniremember because "he had some type of heavy accent" and therefore might not understand the testimony. If the prosecutor challenged the veniremember because he had trouble understanding English, the challenge was improper because there was no evidence to support such a conclusion. If the prosecutor struck the veniremember because he had a Spanish accent, "then we can only conclude that he was improperly challenged because he was Hispanic."

People v. Roberts, 299 Ill.App.3d 926, 702 N.E.2d 249 (1st Dist. 1998) Although a veniremember's untruthfulness in completing a juror card is a race-neutral reason for exercising a peremptory, the explanation was pretextual in this case. First, the "chronology of events" was troubling. "When the trial court said the State's justification was insufficient and asked if the State had anything further, the State responded "No." However, after the State learned the trial court would grant the **Batson** motion unless it offered another reason, the State suddenly asked to see the juror's card. Only after reviewing the card did the State offer "untruthfulness" as its reason, stating that the juror's jury card answers varied from his *voir dire* answers. This chronology of events reveals the State was unaware of the juror's alleged 'untruthfulness' when it made its peremptory challenge." In addition, the record did not support the claim that the juror was untruthful in answering questions about his occupation. The jury card allowed only a "yes" or "no" answer concerning employment. On *voir dire*, the juror said that he worked "on and off." Because neither of the answers allowed by the juror card would have been entirely accurate, under the State's reasoning the juror would have been "untruthful" no matter what he answered.

People v. Davis, 345 Ill.App.3d 901, 803 N.E.2d 514 (1st Dist. 2004) Under **Batson** the defendant, must present sufficient facts to raise an inference that the prosecutor challenged veniremembers based on their race. The factors relevant to a *prima facie* case include: (1) racial identity between the defendant and the excluded veniremember; (2) any pattern of strikes against veniremembers of a particular group; (3) disproportionate use of peremptory challenges against minority veniremembers; (4) the level of minority representation in the venire as compared to the jury that was eventually selected, (5) the prosecutor's questions and statements during *voir dire* and while exercising peremptories; (6) whether the excluded veniremembers were a heterogeneous group sharing race as their only common characteristic; and (7) the race of the defendant, victim and witnesses. Here, the Appellate Court found that a *prima facie* case was shown by the record. The excluded veniremember was the only African-American in the venire, and defendant was African-American. The excluded veniremember had no criminal record or prior jury service, and had no family members who had been charged with or convicted of a crime. The veniremember had been employed as a maintenance engineer for 13 years, was single with two children, had lived at his current address for five years, and did not know any of the parties, witnesses or lawyers. He knew nothing about the case, and had no family members or friends who were associated with law enforcement. In addition, although the juror had been the victim of an auto theft and had a friend who testified in a criminal case ten years earlier, he stated that neither of those experiences would prevent him from being impartial. The court

stressed that other than his race, the excluded veniremember had substantially the same characteristics as white members of the venire who were accepted.

People v. Whaley, 184 Ill.App.3d 459, 540 N.E.2d 421 (1st Dist. 1989) The Appellate Court found that the defendant sufficiently objected to the State's peremptory challenges against the prospective jurors, and thus made the trial judge aware of the claim. "[W]e do not believe that defense counsel is required to use any particular or *pro forma* language to bring a **Batson** claim to a trial court's attention. The fact that the trial court is made aware of the claim, not the manner in which the claim is made, is dispositive." (Defense counsel argued to the trial judge that he saw no reason for the prosecutor to exclude either of the black jurors).The Court also held that to preserve a **Batson** issue for appeal, it is not necessary to raise the issue in a post-trial motion. The **Batson** case itself requires only a "timely objection."

People v. Washington, 272 Ill.App.3d 913, 651 N.E.2d 625 (1st Dist. 1995) Where the record does not establish the race of excluded venirepersons, a reviewing court may consider defense counsel's uncontested statements identifying the race of such jurors. Defendant did not waive his **Batson** claim, where counsel specifically objected to the State's use of two peremptory challenges on the ground that the jurors were the only two black women in the venire.

Cumulative Digest Case Summaries **§32-4(c)(1)**

People v. Shaw, 2014 IL App (4th) 121157 (No. 4-12-1157, 11/25/14)

1. Under **Batson v. Kentucky**, 476 U.S. 79 (1986), courts follow a three-step procedure to evaluate claims of discrimination in jury selection. During the first step, defendant must make a *prima facie* showing that the State used peremptory challenges on the basis of race. During the second step, the State must articulate race-neutral reasons for its challenges. If the State proffers race-neutral reasons, defendant may rebut the reasons as pretextual. During the third step, the court must determine whether defendant has shown purposeful discrimination in light of all the evidence.

In deciding whether defendant has made a *prima facie* showing, the court must consider the totality of the relevant facts and circumstances surrounding the peremptory challenge. The court should consider a number of factors, including a pattern of strikes against a racial group, a disproportionate use of strikes against a group, the racial composition of the venire as compared to the jury, and whether the excluded jurors were a heterogenous group sharing race as their only common characteristic.

2. The State exercised peremptory challenges on two of the three African-American veniremembers. Defendant, who is African-American, objected to both challenges. As to the first veniremember, defendant argued that there were no facts or circumstances other than race that would explain the challenge. The trial court turned to the State for an explanation. The prosecutor responded that he did not think "this is the correct procedure," since defendant had not established any pattern of strikes with regard to race. Nevertheless, the prosecutor gave a race-neutral explanation for the challenge.

Defendant argued that it would be impossible to show a pattern where there was only one African-American veniremember to strike. The trial court overruled the objection concluding that defendant had not "established a pattern under **Batson**."

Defendant objected to the State's second challenge on the basis that the State had used peremptory challenges against both African-American veniremembers, and thus "we now have a pattern." Without seeking input from the State, the trial court stated that it did not find a pattern with either challenge.

3. The Appellate Court stated that it was unclear whether the trial court had found a *prima facie* case of discrimination. Although the trial court asked for and the State provided a race-neutral explanation for the first challenge, in its ruling the court failed to discuss any of the relevant factors other than the lack of a pattern. The trial court thus failed to proceed methodically through the three-step **Batson** procedure, and incorrectly collapsed the first and second steps into a single inquiry. The record also showed that the trial

court improperly denied defendant's challenge to the first strike solely because he failed to establish a pattern of discrimination, which is only one of several factors relevant to a *prima facie* case.

As to the second challenge, the Appellate Court again held that the trial court failed to follow the clear three-step **Batson** process. It was thus impossible to conduct a meaningful review of defendant's arguments. The Appellate Court remanded the case for the trial court to conduct a full **Batson** hearing.

(Defendant was represented by Assistant Defender Duane Schuster, Springfield.)

Top

§32-4(c)(2)
***Prima Facie* Showing**

People v. McDonald, 125 Ill.2d 182, 530 N.E.2d 1351 (1988) The Court found that defendant presented a *prima facie* showing of racial discrimination. The defendants were black and the prosecutor used peremptory challenges to exclude 16 black jurors, who shared race as their only common characteristic. The Court concluded that the pattern of strikes against the black veniremen, along with the fact that they shared race as their only common characteristic, "compels us to conclude that defendants established a *prima facie* case of discrimination."

People v. Andrews, 146 Ill.2d 413, 588 N.E.2d 1126 (1992) In determining that defendant had failed to establish a *prima facie* case of discrimination in the State's use of peremptories, the trial judge "relied almost exclusively on his observations regarding the prosecutors involved and the local conditions in Cook County." The judge noted that the prosecutors had been before him on numerous occasions and that he believed that they were not "racially prejudiced persons." The judge said that certain "intangibles," which he could not articulate, led to his ruling. The Supreme Court held that the trial judge's ruling was contrary to the manifest weight of the evidence and that the judge improperly overemphasized his own observations and neglected to consider other relevant factors. The State's use of all eight of its peremptory challenges against blacks strongly suggests a racial motivation, establishes a pattern of using strikes against black veniremen and "constitutes the disproportionate use of strikes against black venire persons." The excluded black jurors were a heterogeneous group which shared race as their only common characteristic. The Court acknowledged that all eight of the excluded jurors were engaged in "nonprofessional occupations," but noted that all 13 of the accepted jurors also engaged in such occupations. Six of the 12 jurors who were accepted had past contacts with the legal system, as did five of the excluded veniremen. The fact that three blacks were selected for the jury, while relevant, is not dispositive. The question is whether the State discriminated against the excluded jurors, not whether it failed to discriminate against the accepted jurors. **Batson** is violated if the State excludes even one black venireperson on a racial basis.

People v. Hope, 137 Ill.2d 430, 560 N.E.2d 849 (1990) The trial judge erred in finding the absence of a *prima facie* case under **Batson**. The Supreme Court noted that (1) there was a pattern of State strikes against black venire members. Only 19% of the venire members were black, yet the State used nearly 50% of its peremptory challenges against blacks, resulting in an all-white jury. Although the number of blacks excluded is not, in itself, determinative, it was "very relevant" in this case because "it represented a gross racial imbalance in jury selection." (See also **People v. Evans**, 125 Ill.2d 50, 530 N.E.2d 1360 (1988); **People v. Hooper**, 133 Ill.2d 469, 552 N.E.2d 684 (1989); **People v. Holman**, 132 Ill.2d 128, 547 N.E.2d 124 (1989); **People v. Mahaffey**, 128 Ill.2d 388, 539 N.E.2d 1172 (1989).

People v. Harris, 164 Ill.2d 322, 647 N.E.2d 893 (1994) A *prima facie* showing of discrimination concerning one racial or ethnic group does not automatically establish a *prima facie* case with respect to other groups; although defendant established a *prima facie* case as to the exclusion of black jurors, the

prosecution was not required to provide an explanation for the exclusion of Hispanic veniremembers.

People v. Williams, 173 Ill.2d 48, 670 N.E.2d 638 (1996) The prosecution used a peremptory challenge against an African-American and the defendant raised a **Batson** objection. The prosecutor responded that defense counsel was asking the trial court to find that a *prima facie* case of racial discrimination had been shown. The prosecutor then noted that only one African-American had been challenged, and said, "You saw he was a black man with red hair. You heard the answers to his questions, that he was not satisfied [with the result in a previous case]. I don't think we have to come forward with any reasons why this was - this man was excluded. It is obvious why this person was excluded." The trial court held that defendant had not established a *prima facie* case. The Supreme Court affirmed. Here, the only factors tending to show discrimination were that both defendant and the excluded venireperson were black and the victim was Caucasian. The Court also rejected defendant's argument that discriminatory intent was show by the prosecution's statement that the excluded venireperson was "a black man with red hair." The Court found the statement to be "merely descriptive."

People v. Johnson, 199 Ill.App.3d 798, 557 N.E.2d 565 (1st Dist. 1990) A *prima facie* showing of discrimination was made when the record showed that the defendant was black and that the prosecutor used six of seven peremptories to exclude black venirepersons. Two blacks served on the jury. The Appellate Court stated that the only common characteristic of the excluded blacks was their race (although some had been victims of crime, this was also true of non-blacks who were not challenged).The Court also stated that **Batson** does not require complete exclusion of a racial group to prove discrimination. Finally, the fact that the prosecutor was black is a relevant consideration, but is not dispositive.

People v. Mays, 176 Ill.App.3d 1027, 532 N.E.2d 843 (1st Dist. 1988) A *prima facie* case of purposeful discrimination was shown where the defendant was black and the prosecutor "excluded all the blacks from the jury by using 86% of its challenges to excuse 100% of the blacks in the 40-person venire, while it used only 3% of its challenges to exclude nonblacks."

People v. Champs, 273 Ill.App.3d 502, 652 N.E.2d 1184 (1st Dist. 1995) Under the circumstances of this case, the trial judge's determination that no *prima facie* case had been established was contrary to the manifest weight of the evidence. The State used 60% of its peremptories against African-American veniremembers, who were but 19% of the venire. In addition, African-American representation on the jury was only 8.3%, compared with 19% in the venire as a whole. The Court remanded the cause for a hearing on the second stage of the **Batson** inquiry - whether the State could give race-neutral reasons for its peremptories.

People v. Hayes & Burton, 244 Ill.App.3d 511, 614 N.E.2d 229 (1st Dist. 1993) The State used seven of its eight peremptory challenges to excuse black veniremen. However, the trial court found that no *prima facie* case of discrimination had been shown because the jury sworn to hear the case included several blacks, one alternate was black, the defense excused one black after he had been accepted by the State and all of the principals in the trial were black. The Appellate Court found that the trial court erred by ruling that a *prima facie* case of discrimination had not been proven. The use of seven of eight peremptories against blacks established two of the factors commonly used to determine whether a *prima facie* case exists: a pattern of strikes against blacks and the disproportionate use of peremptories against black veniremen. The excluded jurors were a heterogeneous group which shared race as their only common characteristic. In addition, they shared several characteristics with white veniremen who were selected for the jury.

People v. Charles, 238 Ill.App.3d 752, 606 N.E.2d 603 (1st Dist. 1992) After the State exercised seven of its 11 peremptory challenges to excuse black jurors, the defense moved for a mistrial on **Batson** grounds.

The Appellate Court found that a *prima facie* showing was made where the State used a disproportionate number of its peremptories to challenge black jurors, the excluded jurors were a heterogeneous group and the prosecutor referred to a black venireman named Zebedee Braithwaite as "Zippodee Dooda."

People v. Holmes, 272 Ill.App.3d 1047, 651 N.E.2d 608 (1st Dist. 1995) The State exercised its first peremptory against a black venireperson, and defense counsel argued that the prosecution had no reason to exclude the juror other than her membership in the NAACP. The trial court ruled that the defense had not made a *prima facie* case because the juror was one of the few divorced venirepersons and the only one who belonged to the NAACP. The Appellate Court observed that except for her race and membership in NAACP, the excluded black veniremember had "substantially the same characteristics" as the jurors the State accepted. In addition, the prosecution accepted white jurors with memberships in Jewish, community and fraternal groups. The Court concluded that the venirewoman's race and membership in an organization "which can be identified with race" made her exclusion race-specific, and that the judge should have held that the defense had proven a *prima facie* case.

Cumulative Digest Case Summaries **§32-4(c)(2)**

People v. Davis, 231 Ill.2d 349, 899 N.E.2d 238 (2008)

In 2008, the Supreme Court remanded the cause for a new **Batson** hearing because in conducting a **Batson** hearing *sua sponte*, the trial court failed to make a sufficient record to allow review. Here, the Supreme Court found that the trial judge did not abuse its discretion by finding on remand that the defendant failed to establish a *prima facie* case for a **Batson** violation. (See also, **HOMICIDE**, §§26-1, 26-2).

In re A.S., 2016 IL App (1st) 161259 (No. 1-16-1259, 10/7/16)

Batson established a three-step process for addressing claims of racial discrimination in jury selection. First, a defendant must make a *prima facie* showing that the State used its peremptory challenges on the basis of race. Second, the burden shifts to the State to articulate race-neutral reasons for excluding each dismissed juror; the defendant then may argue that the reasons are pretextual. Third, the trial court must undertake "a sincere and reasoned attempt to evaluate the prosecutor's explanations" and make the ultimate determination of whether defendant has made a case of purposeful discrimination.

The Appellate Court held that the trial court properly found that defendant made a *prima facie* case that the State used its peremptory challenges on the basis of race. The record showed that the State used 80% of its peremptory challenges against African-Americans, only 8.3% of the jury was African-American, and three members of the venire challenged by the State were a heterogenous group, sharing race as their only common characteristic.

But once the State came forward with reasons for its challenges, the trial court failed to conduct a proper third-stage evaluation of those reasons. The State provided race-neutral explanations for all but one of its challenges. As defendant pointed out below, however, in three of those instances the State also accepted white jurors with similar though not identical characteristics. The trial court nonetheless accepted the State's explanations without any scrutiny and thus failed to conduct a meaningful third-stage evaluation of the State's reasons. The trial court also failed to require the State to provide a race-neutral explanation for one of its peremptory challenges. And finally, the trial court improperly relied on the dissent in **Batson** as support for its decision.

The Appellate Court remanded the case for further **Batson** proceedings.

(Defendant was represented by Assistant Defender Rebecca Cohen, Chicago.)

People v. Gutierrez, 402 Ill.App.3d 866, 932 N.E.2d 139 (1st Dist. 2010)

1. Under **Batson v. Kentucky**, 476 U.S. 79 (1986), the 14th Amendment prohibits the use of peremptory challenges solely on the basis of race. **Batson** claims are resolved under a three-step process.

First, the defendant must make a *prima facie* showing that the State has exercised peremptory challenges on the basis of race. Once a *prima facie* has been made, the burden shifts to the State to articulate a race-neutral reason for excusing a venireperson. Finally, the trial court must determine, based on all the evidence, whether the defendant has satisfied his burden of establishing purposeful discrimination.

A *prima facie* case is not established merely because a number of minority veniremembers have been excused through peremptories. Rather, all relevant circumstances must be considered, including: (1) the racial identity between the defendant and excluded venirepersons, (2) any pattern of strikes against minority veniremembers, (3) any disproportionate use of strikes against such members, (4) the level of minority representation in the jury compared to the venire, (5) any statements made by the prosecutor during *voir dire* and in exercising challenges, (6) whether the excluded venirepersons were a heterogeneous group sharing race as their only common characteristic, and (7) the races of the defendant, victim, and witnesses. The trial court's determination concerning a *prima facie* case will not be disturbed on appeal unless it is against the manifest weight of the evidence.

2. Defendant failed to make a *prima facie* case that the prosecutor used peremptories to excuse Black jurors.

First, there was no racial identity between defendant and the stricken jurors; defendant was Hispanic and Caucasian, while the excluded jurors were Black.

Second, the State did not use a disproportionate number of peremptory challenges to exclude Black jurors where four of its seven peremptories were exercised against Blacks.

Third, there was no pattern of strikes against Black veniremembers where the State accepted two panels which included four Blacks before exercising any peremptories against Blacks.

Fourth, the jury which heard the case had a higher percentage of Black members than the venire as a whole.

Fifth, the prosecutor's statements during *voir dire* gave no indication of a racial motivation for the State's exercise of peremptories.

Sixth, neither the decedent, the defendant, nor the attorneys were Black.

Seventh, the excluded veniremembers were not a heterogeneous group sharing race as their only characteristic. Instead, the stricken jurors were similar in whether they were parents, their criminal histories, and their employment status.

The court also held that a racial motivation was not shown by the fact that the State's final four peremptories were used to excuse Black jurors.

Defendant's convictions and sentences were affirmed.

(Defendant was represented by Assistant Defender Christopher Kopacz, Chicago.)

Top

§32-4(c)(3)
Neutral Explanations

Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) A three-step procedure is required in resolving **Batson** objections: (1) whether the party bringing the challenge has established a *prima facie* case of racial discrimination, (2) whether the party exercising the peremptory offers a race-neutral reason for the exclusion, and (3) whether the objecting party has carried his burden to establish racial discrimination in the use of the peremptory. The second step of the process does not demand a "persuasive" or even a "plausible" reason. Instead, only a reason that is not inherently discriminatory need be given. Here, the Court of Appeals erred by holding that the reason offered by the State at the second stage (that the veniremen had unusually long hair and facial hair) must be not only race-neutral but at least "minimally persuasive." The credibility of the explanation is not in issue until the third stage of the inquiry, when the burden of persuasion

is on the party bringing the challenge.

Hernandez v. New York, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) The prosecutor used peremptories to excuse bilingual jurors on the ground that their responses to *voir dire* made him fear that they would not limit themselves to the official interpreter's translation of Spanish testimony. The trial court found this explanation to be racially neutral, and the Supreme Court found that this ruling was not clearly erroneous. However, the Court noted that striking all veniremen who speak a certain language, without regard to their statements about whether they could be impartial, is likely to be a mere pretext for racial discrimination.

Turner v. Marshall, 121 F.3d 1248 (9th Cir. 1997) The prosecution violated **Batson v. Kentucky** by exercising a peremptory against an African-American (who was a "classic prosecution juror") because he was hesitant to view gruesome photographs of the crime scene. The prosecutor's explanation for the peremptory was pretextual, particularly since a white juror who expressed greater reluctance to view the photographs was allowed to remain on the jury.

People v. Hope, 147 Ill.2d 315, 589 N.E.2d 503 (1992) A finding of no purposeful discrimination in the prosecutors' use of peremptory challenges was contrary to the manifest weight of the evidence. The factual findings of the trial court are entitled to "great deference," but in this case there were "exceptional circumstances" which indicated that the trial court had erred. (The prosecutor used 11 peremptory challenges, including five against blacks, and the only other black venireman was excused for cause.) The explanations offered by the State were pretextual where whites exhibiting the same characteristics as those cited by the prosecutors were allowed to serve. "The prosecution's reasons are a collection of vague common characteristics and include repeated reliance upon the alleged demeanor of jurors or mistaken allegations about the jurors. Examined as a whole, they establish racial discrimination."

People v. Andrews, 155 Ill.2d 286, 614 N.E.2d 1184 (1993) The State exercised eight of its 14 peremptory challenges, all against black venirepersons. Three members of the jury which heard the case were black. The prosecutor claimed that because the case potentially involved a death sentence, the State wanted mature jurors who were willing to sit in judgment of another person. In the State's view, this meant jurors who were self-employed or who had prior jury service. In addition, the State claimed that it wanted to avoid sympathy by excluding jurors who were either the same age as the defendant or who had children of defendant's age. Finally, because defendant was expected to assert that his confession had been coerced by a police beating, the State wanted jurors with favorable opinions of police officers. The Supreme Court found the prosecutor's explanations to be race-neutral. Where the prosecution offers more than one explanation for its use of a peremptory, a finding of race-neutrality should be accepted if at least one explanation is race-neutral. Finally, the Court found that its conclusion of no purposeful discrimination was supported by the fact that three blacks were allowed to serve on the jury despite the State having unused peremptories, and because the State's peremptories were exercised in a "non-consecutive pattern."

People v. Harris, 164 Ill.2d 322, 647 N.E.2d 893 (1994) The Court held that it is not necessarily pretextual to dismiss a juror based upon a lack of knowledge concerning certain information, even if no follow-up questions were asked. Whether an explanation is race-neutral is primarily a question of credibility; thus, while "extra caution" may be warranted where a peremptory is based on lack of knowledge, such a challenge is not "automatically invalid." Here, the Court accepted the State's claim that it had not asked further questions because it did not want to taint the remaining members of the venire.

People v. Wiley, 165 Ill.2d 259, 651 N.E.2d 189 (1995) The State claimed that it had selected the jury according to a "wish list" of characteristics it hoped to find, including "the ability to be fair, honest, sober,

cogent, patient, attentive, detail-oriented, and analytical." The trial court accepted the prosecution's explanations. The Supreme Court rejected defendant's argument that since several jurors were accepted by the State despite lacking the traits set out in the list, the "wish list" was nothing more than a pretext for discrimination. Although not all the jurors accepted by the State possessed all of the "ideal attributes" from the list, that fact alone did not establish racial discrimination. The Court again recognized that the credibility of the State's explanations at the **Batson** hearing is to be determined by the trial court, whose ruling is to be affirmed unless it is manifestly erroneous. However, the Court stressed that the prosecution must give "more than a bald assertion of nondiscriminatory motives or good faith," that the specific bias allegedly shown by the juror must relate "to the cause being tried," and that challenges based on a veniremember's demeanor must be closely scrutinized.

People v. Young, 128 Ill.2d 1, 538 N.E.2d 453 (1989) The State's explanations for its exclusion of black venirepersons were race-neutral and sufficient under **Batson**. The defendant first contended that the prosecutor should not be allowed to rely upon demeanor as a reason for excluding a juror because this may be a subterfuge for excusing a juror on the basis of race. The Court held that demeanor or outward manner or bearing "has anciently been regarded as being of significance [and] demeanor of a prospective juror has traditionally been a factor of importance in jury selection." Thus, "a juror's demeanor may constitute a legitimate and racially neutral reason for excusing him or her." The Court again stressed that a prosecutor's reasons
for the use of peremptory challenges "need not rise to the level justifying the exercise of a challenge for cause."

People v. Mack, 128 Ill.2d 231, 538 N.E.2d 1107 (1989) Five black veniremen were excused on the basis of their demeanor (i.e. failed to make eye contact with the prosecutors, hesitated in responding to questions about capital punishment, responded in a casual manner to some questions, looked at the defense but not at the prosecutors, and didn't seem to understand certain questions). The Court stated that the prosecutor may properly exclude prospective jurors on the basis of demeanor. "We cannot say that the prosecutors in this case were unjustified in excusing the prospective jurors for the grounds cited. Three black veniremen were excused because of their employment and employment status (i.e., unstable job history, worked as a security guard but frequently changed jobs; employed by a "well-known criminal defense firm as, in her words, a "brief specialist"; 38 years old, divorced, unemployed and attending school). The Court stated that the "State's concern over the employment status and positions of these prospective jurors was legitimate and race neutral." One black venireman was excused because of her social relationship with a number of attorneys and a judge whose courtroom was across the hall. Finally, four black veniremen were excused based mainly on their age and status as renters rather than homeowners.

People v. McDonald, 125 Ill.2d 182, 530 N.E.2d 1351 (1988) The State's explanations for the use of peremptory challenges against black venirepersons were inadequate to rebut the *prima facie* case of discrimination. The prosecutor excluded two blacks whose spouses were teachers, because teachers and people who live with teachers "tend to use their own reasoning and [do] not rely so much on the evidence and arguments presented by counsel." However, the prosecutor accepted a white juror who is a teacher. "No explanation is offered for this patent inconsistency, and our review of the record reveals none." The prosecutor struck a 34-year-old black man because "young single males are the worst jurors for a rape case." This reason was "untenable" when the prosecutor accepted an 18-year-old white male. Some of the blacks were struck because they were mothers of large families. This claim was "belied" by the fact that the prosecutor accepted a white juror who was the mother of a large family. The prosecutor struck a black who stated that she had been on jury duty four years previously, but did not state whether she actually served on a jury. The prosecutor accepted a white juror who had actually served on two previous juries. The prosecutor excused a black juror because she was a nurse, claiming that a nurse would not be an acceptable juror. The

prosecutor accepted a white nurse's assistant "without explaining why a nurse's assistant would somehow be a more acceptable juror than a nurse."The prosecutor struck two black jurors based on their advanced age (63 and 69 years old). This explanation was "inconsistent" with the acceptance of a white juror who was 67 years old.

People v. Walls & Byrd, 220 Ill.App.3d 564, 581 N.E.2d 264 (1st Dist. 1991) The Court found that the State's explanations for its use of peremptories were pretextual. The State challenged one black juror because she was an unmarried mother of children who were about the same age as the defendants and because she was affiliated with an organization known as the "Eastern Star." The Court noted that several jurors who were accepted by the State were parents of children of approximately the same age and that there was no indication that the parental status of any of the jurors would make them biased. In addition, the juror's membership in the "Eastern Star" was not a legitimate race-neutral reason where the prosecutor was not even aware of the nature of that organization. The prosecutor stated that another black prospective juror was excluded because her age was close to that of defendants and because she "stared at" the defendants. The Court noted that two white males of similar ages were accepted, and held that the act of looking at the defendants, even if it occurred, did not disqualify the person from sitting on a jury. A third black juror was excluded because she resided near another "highly-publicized" gang-related incident in which the prosecutor had been involved and because her husband worked for a company where the prosecutor had many friends. The Court found this explanation "untenable" because the State "gave no indication of how or why either of these two factors, even if true, caused them to believe that the juror would have been biased or detrimental to their case in any way."

People v. Mitchell, 228 Ill.App.3d 167, 592 N.E.2d 175 (1st Dist. 1992) A new trial was warranted because the prosecution failed to offer race-neutral explanations to rebut the inference of purposeful discrimination against two black prospective jurors, the only blacks who were not excused for cause. As to one juror, the prosecution merely stated that defense counsel "knows our reason." As to the other juror, the prosecution claimed that it had a rap sheet indicating that a man of the same name and age had once been arrested in Los Angeles. Because there was nothing in the record indicating that the prospective juror had ever been to Los Angeles, and because the prosecution failed to ask the judge to clarify the juror's identity, the Court found that the explanation was pretextual.

People v. Banks, 241 Ill.App.3d 966, 609 N.E.2d 864 (1st Dist. 1993) The prosecution exercised six straight peremptory challenges against black jurors. The State withdrew its last challenge after defendant made a **Batson** objection and the trial court stated that it was "a very wise decision" to withdraw the challenge because the juror was "impeccable." The judge asked the prosecution to explain its other challenges so that the case would not have to be "sent back" for a **Batson** hearing, and found that the explanations were race-neutral. The Appellate Court found that the prosecutor's explanations were not race-neutral, and that in some instances the trial court failed to adequately scrutinize those explanations. The Court rejected the prosecution's assertion that it rejected a 65-year-old female black juror (who rented an apartment, was a widow and had a grown daughter) because she had a "limited background." The Court found the prosecutor's reasoning to be "nonsensical and completely meaningless." The prosecutor improperly excused another black juror on the ground that she was divorced and might identify with the defendant because she had three children of roughly the same age. The prosecution offered no reason for distinguishing the black juror from white jurors with children of comparable age, and found that the trial judge failed to make "a sincere and reasoned attempt to evaluate the prosecutor's explanation. Furthermore, the judge's open disdain for **Batson** (calling it the "worst decision ever handed down," "poorly written, poorly understandable, certainly wrong" and "ludicrous and ridiculous") indicated that he did not attempt to fairly evaluate the prosecution's statements.

People v. Sims, 249 Ill.App.3d 246, 618 N.E.2d 1083 (1st Dist. 1993) The prosecution's explanations for its use of peremptories were not sufficiently race-neutral. The prosecutor excused two employees of the U.S. Postal Service because he believed that postal workers are "dishonest and have no respect for the law." The Court found that this notion "smacks of the kind of non-specific, subjective and racially suspect" explanation which the **Batson** decision was intended to "obliterate," and stated that such a "baseless explanation should have been a warning to the trial court to employ a heightened scrutiny in examining the remaining explanations[.]" The Court rejected the State's claim that it had excused a 62-year-old venireman because he was employed only as a stock person at a shoe store, and the prosecutor expected a man of that age to be employed beyond that level. "This explanation is not only ludicrous but . . . bespeaks a brand of bourgeois arrogance on the part of the State in deciding what 'level of employment' a man of 62 years should possess."

People v. Gaston, 256 Ill.App.3d 621, 628 N.E.2d 699 (1st Dist. 1993) Two African-American venire members were improperly excluded from the jury. The Court concluded that while a venireperson's own unemployment is a race-neutral reason for exclusion, the unemployment of a relative has little impact on one's ability to serve as a juror. In addition, the prosecutor acted improperly when he excluded a venirewoman because she was "extremely religious" and might therefore "look beyond someone's guilt." The venirewoman had responded, when asked about her hobbies and family, that she did not have "too many hobbies" but read the Sun-Times and attended church. Since the prosecutor asked no other questions about her religious practices or whether they would affect her ability to be a juror, the Court concluded that there was no reasonable basis for believing that she was "extremely religious."

People v. Allen, 168 Ill.App.3d 397, 521 N.E.2d 1172 (2d Dist. 1988) The explanation by the State for the exclusion of a black juror was insufficient where "the prosecutor acknowledged he had challenged the juror on account of the shared race with the defendant and because racial issues may be raised at trial. The prosecutor thought the juror would be isolated, as the only black on the panel, and placed in a difficult position. The explanation offered for exclusion of this juror essentially related to the juror's race and that is the standard which **Batson** seeks to avoid."

People v. Brown, 152 Ill.App.3d 996, 505 N.E.2d 397 (4th Dist. 1987) The prosecutor used a peremptory challenge to exclude the only black venireman. In explaining the peremptory challenge, the prosecutor noted that the black venireman "had seen defendant in taverns and that this [venireman] was the only potential juror who had any knowledge of defendant." The Court held: "Although this explanation may not be sufficient to challenge a juror for cause, we believe that this is the type of neutral explanation which is acceptable pursuant to the standards for determining discrimination in the selection of jurors which were set forth in **Batson**."

People v. Davis, 287 Ill.App.3d 46, 677 N.E.2d 1340 (1st Dist. 1997) Bertha White was excused in violation of **Batson**. The prosecutor claimed he excused White because she "has a son approximately the defendant's age; we felt she would be very sympathetic towards [defendant]." This explanation was 'clearly pretextual"; White's son was 21 at the time of trial, while the defendant was 36. In addition, the prosecutor accepted Caucasian veniremembers who had children who were closer in age to the defendant, including one who had a son in his late 20's, and accepted two African-American jurors who had sons in their middle 30's.

People v. Randall, 283 Ill.App.3d 1019, 671 N.E.2d 60 (1st Dist. 1996) The Appellate Court lamented "the charade that has become the **Batson** process. The State may provide the trial court with a series of pat race-neutral reasons for its exercise of peremptory challenges. Since reviewing courts examine only the record, we wonder if the reasons can be given without a smile. Surely, new prosecutors are given a manual, probably entitled, 'Handy Race-Neutral Explanations' or '20 Time-Tested Race-Neutral Explanations.' It might

include: too old, too young, divorced, 'long, unkempt hair,' free-lance writer, religion, social worker, renter, lack of family contact, attempting to make eye-contact with defendant, 'lived in an area consisting predominately of apartment complexes,' single, over-educated, lack of maturity, improper demeanor, unemployed, improper attire, juror lived alone, misspelled place of employment, living with girlfriend, unemployed spouse, spouse employed as school teacher, employment as part-time barber, friendship with city council member, failure to remove hat, lack of community ties, children same 'age bracket' as defendant, deceased father and prospective jurors' aunt receiving psychiatric care. Recent consideration of **Batson** issues makes us wonder if the rule would be imposed only where the prosecutor states that he does not care to have an African-American on the jury. We are reminded of the musing of Justice Cardozo, 'We are not to close our eyes as judges to what we must perceive as men.'"

Cumulative Digest Case Summaries **§32-4(c)(3)**

Foster v. Chatman, 578 U. S. ___, 136 S. Ct. 1737, ___ L.E.2d ___ (No. 14-8349, 5/23/16)

The constitution forbids striking even one prospective juror for racially discriminatory purposes. **Batson**, 476 U.S. 79 (1986), provides a three-step process for determining when a peremptory strike has been used improperly. First, a defendant must make a *prima facie* case of discrimination. If that case has been made, the prosecution must offer a race-neutral basis for the strike. Finally, the court must determine whether the defendant has shown purposeful discrimination. Here, only the third step was at issue.

The court held that defendant established that the prosecution used two of its peremptory challenges in a racially discriminatory manner. Although the prosecution provided numerous facially race-neutral explanations for its two challenges, the record demonstrated that the explanations were false and pretextual.

In re A.S., 2016 IL App (1st) 161259 (No. 1-16-1259, 10/7/16)

Batson established a three-step process for addressing claims of racial discrimination in jury selection. First, a defendant must make a *prima facie* showing that the State used its peremptory challenges on the basis of race. Second, the burden shifts to the State to articulate race-neutral reasons for excluding each dismissed juror; the defendant then may argue that the reasons are pretextual. Third, the trial court must undertake "a sincere and reasoned attempt to evaluate the prosecutor's explanations" and make the ultimate determination of whether defendant has made a case of purposeful discrimination.

The Appellate Court held that the trial court properly found that defendant made a *prima facie* case that the State used its peremptory challenges on the basis of race. The record showed that the State used 80% of its peremptory challenges against African-Americans, only 8.3% of the jury was African-American, and three members of the venire challenged by the State were a heterogenous group, sharing race as their only common characteristic.

But once the State came forward with reasons for its challenges, the trial court failed to conduct a proper third-stage evaluation of those reasons. The State provided race-neutral explanations for all but one of its challenges. As defendant pointed out below, however, in three of those instances the State also accepted white jurors with similar though not identical characteristics. The trial court nonetheless accepted the State's explanations without any scrutiny and thus failed to conduct a meaningful third-stage evaluation of the State's reasons. The trial court also failed to require the State to provide a race-neutral explanation for one of its peremptory challenges. And finally, the trial court improperly relied on the dissent in **Batson** as support for its decision.

The Appellate Court remanded the case for further **Batson** proceedings.

(Defendant was represented by Assistant Defender Rebecca Cohen, Chicago.)

Top

§32-5
Impartial Jury

§32-5(a)
Generally

Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986) The exclusion of prospective jurors who could not impose the death penalty (pursuant to **Witherspoon v. Illinois**, 391 U.S. 510 (1968)) does not violate the fair cross-section requirement of the Sixth Amendment nor violate the right to an impartial jury (i.e., by resulting in a "conviction prone" jury). See also **People v. Johnson**, 114 Ill.2d 170, 499 N.E.2d 1355 (1986).

People v. Kuntu, 196 Ill.2d 105, 752 N.E.2d 380 (2001) The right to a jury trial guarantees a fair trial by a panel of impartial jurors. A veniremember is not competent to sit as a juror if his or her state of mind is such that the defendant will not be afforded a fair and impartial trial. The burden of showing that a venireperson possesses a disqualifying state of mind rests on the party making the challenge. Determining whether a venireperson can be impartial is within the sound discretion of the trial court, which must rely on the entire *voir dire* examination. After hearing evidence, the trial court found that the State's Attorney and jury foreman were former classmates, had only a casual relationship, and had seen each other only twice in the 28 years since their graduation. The trial court also found that the juror had correctly answered questions during *voir dire* and on his jury card, had not attempted to hide or understate his relationship with the State's Attorney, and would not have been subject to a challenge for cause.

People v. Buss, 187 Ill.2d 144, 718 N.E.2d 1 (1999) The trial judge did not err by denying defendant's challenge for cause to a veniremember who was married to a sheriff's deputy of another county when the juror indicated that she could be fair and impartial. The refusal to excuse the juror was not inconsistent with the judge's excusal for cause of a juror who was employed at a school where the defendant's stepmother worked, because the latter juror acknowledged that her consideration of the evidence might be affected by her relationship with the defendant's stepmother.

People v. Harris, 225 Ill.2d 1, 866 N.E.2d 162 (2007) **Witherspoon v. Illinois** provides that only veniremembers who cannot impose a death sentence may be excused for cause based on their beliefs concerning the death penalty. The right to an impartial jury prohibits removal of a prospective juror for cause where the veniremember's general objections to the death penalty will not substantially impair the performance of his or her duties as a juror. Whether the ability to perform such duties is impaired must be decided based on the record as a whole. The trial court's decision to remove a prospective juror for cause is entitled to "great deference on review."Where the veniremember made ambiguous statements concerning his ability to follow the law, but according to the trial court shook his head "no" several times while stating that he could follow the law, the Supreme Court deferred to the trial court's finding that the individual's demeanor indicated he would be unable to perform his duties.

People v. Roberts, 214 Ill.2d 106, 824 N.E.2d 250 (2005) The Court held that 725 ILCS 5/115-4(g) and Supreme Court Rule 434(e), which provide that "[i]f before the final submission of a cause a member of the jury dies or is discharged he shall be replaced by an alternate juror in the order of selection," were intended to require the replacement of a juror who dies or is discharged *before* deliberations begin. Neither §115-4(g) nor Rule 434(e) were intended to prohibit substitution of a juror *after* deliberations have started. The trial court has discretion, as part of its responsibility to manage the jury process, to substitute a juror after deliberations have commenced. The trial court abuses its discretion by the post-submission substitution of a juror if, based on the totality of the circumstances, there is "potential prejudice" to the defendant.

Considerations in determining potential prejudice include: (1) whether the original jurors and alternate juror were exposed to prejudicial outside influences; (2) whether the original jurors formed opinions about the case in the absence of the alternate; (3) whether the reconstituted jury was instructed to begin deliberations anew; (4) whether there is any indication that the jury failed to follow the court's instructions; and (5) the length of the deliberations before and after substitution. Here, defendant was prejudiced by the post-submission replacement of a juror. First, the alternate juror was aware of improper contact between a witness and the excused juror, but was not questioned to insure that she was not biased. In addition, the 11 original jurors had voted twice before the jury was reconstituted.

People v. Towns, 157 Ill.2d 90, 623 N.E.2d 269 (1993) The defendant was not denied a fair trial because it was revealed after trial that one juror, a practicing attorney, had attended law school with the prosecutor. In *voir dire*, the juror stated she knew the assistant prosecutor from her practice of law but that their relationship would not affect her ability to be fair. Defense counsel challenged the juror for cause on the ground that a practicing attorney should not be on the jury. However, defense counsel chose not to exercise a peremptory challenge when the challenge for cause was denied.

People v. Silagy, 101 Ill.2d 147, 461 N.E.2d 415 (1984) After testimony had been heard at defendant's trial, defense counsel asked that a juror be removed and replaced by an alternate because the juror had been observed "periodically dozing during the trial." The trial judge stated that he had not observed such behavior, and the juror said he did not think he had missed any of the testimony. The judge also asked why defense counsel had not called the court's attention to the alleged problem earlier, and counsel acknowledged that she should have objected earlier. The Supreme Court found that it was not shown that the above juror "slept regularly during the trial [and] the trial court found that the evidence was insufficient to prove that he was asleep at any time." Also, "if the defendant or his attorney did see the juror sleeping, there was a duty to call it to the attention of the court at that time."

People v. DelVecchio, 105 Ill.2d 414, 475 N.E.2d 840 (1985) The defendant contended that the trial judge erred by failing to excuse veniremen who heard another prospective juror, who was excused, state, "I think the guy [defendant] shouldn't be out walking the streets." The Supreme Court rejected this contention; "[w]e are unable to say that because of this single, isolated comment the jurors were unable to reach a verdict based solely on the evidence."

People v. Jones, 105 Ill.2d 342, 475 N.E.2d 832 (1985) At the conclusion of defendant's trial, a janitor found a mimeographed copy of a racist note in the jury room. (The Supreme Court stated that it refused to "disseminate the scurrilous material," and simply noted that the so-called "joke" contained "denigrating, racist comments which are insulting to black people.") The note was given to the judge, and the jurors were examined individually about it. Nine of the 12 jurors had not seen the note; three jurors on the panel said they had seen it, and two jurors had read part of it. All three said it would have no prejudicial effect on their deliberations. The juror who had brought the racist note into the jury room was dismissed and replaced by an alternate juror. The defendant's motion for mistrial was denied. The Supreme Court noted that in most cases involving claims of deprivation of due process, evidence of prejudice to the accused is required. However, "there are circumstances which create 'such a probability that prejudice will result that [the trial] is deemed inherently lacking in due process.' Where racist material is found in the jury room during the trial of an accused black man, and the material has admittedly been read by three members of an all-white jury, such circumstances are intolerable, and prejudice to defendant will be presumed.

People v. Whitehead, 169 Ill.2d 355, 662 N.E.2d 1304 (1996) Defendant claimed that he was denied the right to trial by an impartial jury where the jurors: (1) learned that their names and addresses had been published in a local newspaper, and (2) observed an outburst against the defendant by a witness (the mother of the victim). An outburst from a family member of the victim creates prejudice only where the jurors are

influenced to the extent that they cannot remain fair and impartial. Similarly, the publication of jurors' names and addresses is prejudicial only where "an honest juror would therefore give sway to his emotions and disregard the fundamental requirement of a fair trial and decide to convict a person in order to be absolutely secure." Here, there was no prejudice to defendant from the mother's outburst, which was brief and isolated. There was also no reason to believe that publication of the jurors' names and addresses rendered them incapable of rendering an impartial verdict.

People v. Porter, 111 Ill.2d 386, 489 N.E.2d 1329 (1986) Attached to defendant's post-trial motion was an affidavit of a juror, which stated that a fellow juror had informed him of a third juror who attended church with the victim's mother. The affidavit also said that "when the jury was given the case to deliberate on," the juror in question "said as far as she was concerned, they could vote guilty right then, and she made this statement before any discussion was had on the evidence." Noting that the burden is on the defendant to establish the prejudice or bias of a juror, the Court held that the defendant did not sustain his burden. The Court also held that the juror's statement upon entering the jury room for deliberations did not establish that she had previously determined defendant's guilt: " the jury had retired to the jury room to begin its deliberations. In doing so some members of the jury must, of necessity, be first to voice an opinion."

People v. Bounds, 171 Ill.2d 1, 662 N.E.2d 1168 (1995) During jury selection, a juror said that her mother might be hospitalized in the near future and she would have difficulty concentrating on the case if her mother was hospitalized. This juror was selected and the jury was sworn, but before any evidence was heard, the judge learned that the juror's mother had been hospitalized and was terminally ill. The court excused the juror from further service. The Supreme Court held that the defendant was not entitled to be tried by the specific jury that had been selected; a defendant only has the right to be tried by an impartial tribunal, a right that was not affected by substitution of the alternate juror.

People v. Gallano, 354 Ill.App.3d 941, 821 N.E.2d 1214 (1st Dist. 2004) It is error to dismiss a juror during deliberations if there is any reasonable possibility that the dismissal stems from the juror's views regarding the sufficiency of the evidence. "This rule of law ensures that a defendant's constitutional right to a unanimous jury verdict is protected and guarantees that a juror will not be excused in a manner that appears to facilitate or manipulate the rendering of a guilty verdict." The trial court erred by dismissing a juror during deliberations after the juror sent a note stating that he was the only jury member who felt there was a reasonable doubt of guilt. The Court concluded that the juror's view of the evidence was the reason for his dismissal; although the State conducted an investigation of the juror's responses during *voir dire* and learned that he had misstated his criminal record, it decided to conduct such an investigation only after learning that the juror was the lone holdout. Under these circumstances, the trial court erred by relying on the juror's untruthfulness during *voir dire* as a justification for replacing him with an alternate juror who had been released and then recalled.

People v. Sanders, 342 Ill.App.3d 374, 795 N.E.2d 329 (5th Dist. 2003) The trial judge did not abuse his discretion by discharging a juror who realized during trial that he knew the victim of one of the offenses and who stated that he could find it "quite hard" to be fair and impartial. The juror was the only African-American on the venire, defendant was an African-American, the juror had made other attempts to be removed from the jury, and the judge expressed doubts whether the juror was being truthful. Although the defendant did not seek to have the juror removed, "[w]e cannot conclude that the trial court abused its discretion by removing a juror who admitted that he would find it 'quite hard' to be a fair and impartial juror." The mere fact that defendant did not object to leaving a juror on a case does not mean that the "circuit judge should surrender his obligation to ensure a fair trial for both the State and the defendant."

People v. Smith, 341 Ill.App.3d 729, 793 N.E.2d 719 (1st Dist. 2003) After the jury had deliberated for

several hours the court was informed that one of the jurors had told other jurors that she knew defendant and his two alleged accomplices, and was aware of their gang activities and the relative heights of defendant and one of the accomplices. When questioned in chambers, the juror stated that she recognized defendant and had seen him and the two accomplices selling drugs in her relative's neighborhood. She admitted that she had told several other jurors about her knowledge of defendant and the two accomplices. The jurors to whom the first juror had spoken were also questioned, and said they had been told that defendant was "a bad kid," the three men were gang members, and one of the accomplices was taller and heavier than defendant. The juror who knew defendant was dismissed, as was a second juror who said that he could no longer be impartial. A third juror was allowed to remain on the jury after she said that she would be affected by the statements but could make a decision based solely on the evidence. As a matter of plain error, the Appellate Court held that defendant was denied a trial by an impartial jury. The excluded juror's comments were clearly prejudicial to defendant. Although the trial court conducted extensive *voir dire* and received assurances from the remaining jurors that they could be fair, those actions were not sufficient to preclude any prejudice. The court noted that "[a] juror's statement upon interrogation that he has not been influenced should not be considered conclusive, for jurors themselves are incapable of knowing the effect which prejudicial matters may have upon their unconscious minds."

People v. Bennett, 282 Ill.App.3d 975, 669 N.E.2d 717 (3d Dist. 1996) Defendant's right to an impartial jury and to be present were violated where 16 of the 29 veniremembers were questioned outside his presence. The Court found that defendant could have helped counsel decide whether peremptory challenges should be exercised against any of five members of the petit jury who were questioned in defendant's absence, and that the trial court's asserted reason for excluding defendant (that there was a security risk) was not sustained by the record.

People v. Johnson, 215 Ill.App.3d 713, 575 N.E.2d 1247 (1st Dist. 1991) The trial judge erred by denying defendant's challenges for cause as to three jurors. The first juror stated that his family members had been victims of a robbery and his sister had been involved in an armed robbery. When the judge asked him if anything about those incidents would affect his ability to be fair, he stated, "I hope not." The second juror had been robbed at knife-point, his friends had been burglarized and one friend had been beaten in front of his home. He responded "not really" when asked whether those crimes would impair his ability to be impartial. The third juror had been robbed and his car had been stolen, and both his mother and his wife had been raped. When asked if those experiences would affect his ability to be fair, he stated "I don't think so." The jurors should have been dismissed for cause because they were crime victims or had friends or relatives who were crime victims, and because each "equivocated" or "expressed self-doubt" when first asked about their ability to be impartial.

People v. Reinbold, 247 Ill.App.3d 498, 617 N.E.2d 436 (3d Dist. 1993) Although a venirewoman need not have been excused merely because her father was a State police officer who was not involved in the case, a second venirewoman said that she wanted defendant to prove his innocence, that she would "kinda like to hear his explanation" and that she would "feel better if he tried to tell us he's innocent." The juror also said that she would believe that defendant had "something to hide" if he did not testify. Although the trial judge managed to rehabilitate the juror by "drawing out some evidence of impartiality, . . . a great proportion of the *voir dire* shows that she expected the defendant to prove that he was innocent." See also, **People v. Stone**, 61 Ill.App.3d 654, 378 N.E.2d 263 (5th Dist. 1978).

People v. Peterson, 15 Ill.App.3d 110, 303 N.E.2d 514 (5th Dist. 1973) The trial judge should have excused a juror who told counsel that she prayed defendants would plead guilty so she could go home.

People v. Stremmel, 258 Ill.App.3d 93, 630 N.E.2d 1301 (2d Dist. 1994) At defendant's trial the venireman

called to fill the last spot on the jury, William Maschke, was a 19-year veteran of the Rockford Police Department. The Court held that the trial judge erred by refusing to grant the motion to excuse Maschke for cause. The trial court has broad discretion to determine whether a juror can be impartial, but "the relationship of a prospective juror to a party can be so close" that the juror must be excused as a matter of fundamental fairness. Although a venireman is not automatically disqualified because he is a police officer, Maschke was a 19-year veteran of the police department to which 11 witnesses also belonged. Because Maschke had an especially close relationship to the case he should have been excused for cause.

People v. Green, 199 Ill.App.3d 927, 557 N.E.2d 939 (4th Dist. 1990) The defendant sought to excuse a prospective juror for cause because she was a secretary in the State's Attorney's office. The challenge for cause was denied, and defendant used a peremptory challenge to excuse her. The Court found that the juror should have been excused for cause. However, the Court held that the defendant failed to preserve the issue because, after using all of his peremptory challenges, he did not ask for an additional peremptory or indicate that he would have excused a juror if the defense had any remaining peremptories.

People v. Boston, 271 Ill.App.3d 358, 648 N.E.2d 1002 (1st Dist. 1995) A veniremember testified that she was an administrative assistant with the Cook County State's Attorney's office, knew an Assistant State's Attorney who was a possible witness, worked with the witness's sister and was a friend of a police officer. However, she also said that she would not give the Assistant State's Attorney any more credence than any other witness, she was also the friend of a public defender and she could be fair and impartial. The Appellate Court held that the trial court did not err by refusing to excuse the juror for cause. Veniremembers are not to be excluded merely because they are employed by the government or have some relationship to persons connected with the trial; instead, the standard is whether the prospective juror can be "impartial." Here, the veniremember unequivocally stated that she could be fair.

People v. Oliver, 50 Ill.App.3d 665, 365 N.E.2d 618 (1st Dist. 1977) A juror called as a witness during post-trial proceedings admitted that he believed the identification testimony of a State witness because "he knew, based on an experience he had, that the victim of a crime never forgets the face of the man who did it." The juror also admitted that he had been previously attacked by two men who fled before taking any money. Since no money was taken, the juror did not think a crime had occurred. Thus, he did not affirmatively respond during *voir dire* when asked if he had ever been the victim of a crime. The Court held that a juror with such a belief could not come to the trial with a mind uncommitted on the question of guilt or innocence." The Court also noted that "questions of a defendant's right to a trial by a fair and impartial jury cannot be disposed of by the rule of harmless error."

People v. Gaston, 125 Ill.App.3d 7, 465 N.E.2d 631 (1st Dist. 1984) Several days after the verdict, defendant discovered that the jury foreman was a part-time suburban police officer. The trial judge concluded that the juror was not "terribly biased." Noting that the juror had disclosed that he was an engineering assistant, the Appellate Court found that the juror's failure to disclose his employment as a part-time police officer, "where it would have been natural to volunteer that information[,] raises some question as to his motivation." Furthermore, the trial judge's conclusion that the juror was not "terribly biased" suggested "that the judge himself had some doubt about whether the juror was in fact wholly unbiased." See also, **People v. Witte**, 115 Ill.App.3d 20, 449 N.E.2d 966 (2d Dist. 1983).

People v. Mitchell, 121 Ill.App.3d 193, 459 N.E.2d 351 (2d Dist. 1984) The trial judge abused his discretion by denying a defense motion to reopen *voir dire* in regard to one juror. During *voir dire*, a prospective juror responded that he had not been the victim of a crime. After the juror's panel was accepted and sworn, defense counsel learned that the juror had been the victim of a burglary in 1975. The Appellate Court held that defendant was entitled to reopen *voir dire*. Since this error involves "the right to a fair trial

by a panel of impartial jurors [it] cannot be disposed of by the harmless error rule."

People v. Feagans, 118 Ill.App.3d 991, 455 N.E.2d 871 (4th Dist. 1983) Defendant contended that the trial judge refused to excuse for cause a juror who had indicated that he might consider the testimony of a police officer more favorably than the testimony of other witnesses. The Appellate Court held that because defendant failed to exhaust all his peremptory challenges, he was precluded from complaining that the above juror was improperly impaneled.

People v. Rogers, 135 Ill.App.3d 608, 482 N.E.2d 639 (2d Dist. 1985) Defendant presented a consent defense but was convicted of attempt rape. After the verdict had been returned, a juror informed the judge that another juror had read a newspaper article about the case, in violation of the court's admonitions, and had discussed it with other jurors. The article disclosed that defendant had been arrested about three years earlier on charges of kidnapping and rape in separate incidents, that defendant had been convicted of kidnapping, and that he had been released from prison on the day before the incident in the instant case. One juror admitted reading the article and mentioning it to other jurors. He said he told the other jurors that the article did not reveal anything they had not heard in the courtroom. Five other jurors remembered being told about the article. Four of them could not recall the specifics of the discussion. One juror, however, stated that he was told the article revealed that defendant had been released from prison just before the incident. The Court held that defendant was deprived of a fair and impartial jury and that the error was not harmless. The information about defendant's prior arrest for rape was not reversible error by itself, because the complainant's testimony was clear, convincing and corroborated. However, before trial the judge had granted defendant's motion *in limine* to exclude the fact that defendant had been released from prison on the day before the incident, because such evidence was "unduly prejudicial." Thus, a juror "had information which was specifically excluded by the trial court because of its prejudicial nature."

Cumulative Digest Case Summaries **§32-5(a)**

Skilling v. United States, U.S. , 130 S.Ct. 2896, 177 L.Ed.2d 619, 2010 WL 2518587 (2010)

The Sixth Amendment guarantees an accused the right to trial by an impartial jury.

1. Transfer to an different venue for trial is required if extraordinary local prejudice will prevent a fair trial, a basic requirement of due process. Juror exposure to news accounts of a crime alone does not presumptively deny due process. A presumption of prejudice is created by pretrial publicity only in the most extreme cases, taking into account the following factors: (1) the size and characteristics of the community where the crime occurred; (2) the nature of the publicity, in particular, whether it is of the nature or type that potential jurors could not reasonably be expected to ignore; (3) the lapse of time between the charges being brought and the trial, during which the level and intensity of the publicity may diminish; and (4) the jury's verdict, which may undermine the supposition of juror bias if the jury partially acquits. Applying these factors, the Supreme Court found that there was no presumption of prejudice in Skilling's case. A co-defendant's well-publicized decision to plead guilty shortly before Skilling's trial did not change this result. While that plea created a danger of juror prejudice, the trial judge took steps to reduce that risk. The judge delayed Skilling's trial two weeks, and asked the jurors about their exposure to recent publicity during *voir dire*.

2. There is no hard-and-fast formula that dictates the necessary depth or breadth of *voir dire*. Since jury selection is particularly within the province of the trial judge, reviewing courts should not second-guess a judge's estimation of juror impartiality. Applying these principles, the Supreme Court rejected Skilling's claim that the five-hour *voir dire* conducted by the trial judge was inadequate to detect juror bias. The Court noted in particular that the judge first screened jurors though a comprehensive written survey drafted in large part by defense counsel. The survey helped identify jurors excusable for cause and provided a springboard for further questioning. The judge conducted individual questioning of jurors, informing jurors that there

were no right or wrong answers. The parties were provided an opportunity to conduct follow-up questioning. The seated jurors did not display bias.

The Supreme Court therefore concluded that Skilling did not establish that a presumption of juror prejudice arose or that actual bias infected the jury that tried him.

People v. Runge, 234 Ill.2d 68, 917 N.E.2d 940 (2009)

1. A criminal defendant has a constitutional right to be tried by an impartial jury. A juror is biased where he or she has a fixed opinion which prevents a fair and impartial determination of guilt or innocence.

The trial court has discretion to determine whether the entire jury should be questioned about the possibility that a member of the jury is biased, and must consider whether such questioning might compound the problem of a biased juror by attracting the attention of other jury members. Where the trial court makes an inquiry that is appropriate under the circumstances, its ruling on the possible bias of a juror will be affirmed unless there is an abuse of discretion.

2. The trial court did not err by allowing a juror whose partiality was questioned [Juror A] to continue to sit on the jury during the guilt/innocence stage, but replacing the juror when additional information came to light at the death penalty stage. During *voir dire*, Juror A said that he would be able to be fair. On the fifth day of the nine-day guilt/innocence phase, however, the foreperson expressed concern to the court that Juror A had been "cheering vocally" when the prosecution "made a good point." The trial court questioned Juror A, determined that he had not made up his mind on defendant's guilt, and allowed him to remain on the jury.

On the following day, the trial court again inquired of Juror A after he threw his notes against the wall when the trial court overruled a State objection. Juror A stated that he was frustrated because he was not able to keep up with the proceedings in his notes, and again said that he had not made up his mind on guilt or innocence. The trial judge again allowed him to remain on the jury.

On the sixth day of the death penalty proceedings (before any mitigation had been presented), the foreperson reported to the trial court that Juror A had made derogatory comments about the defendant and had expressed fear that the defendant's wife, who had been granted immunity, would seek revenge against the jurors if defendant was sentenced to death. The trial court again questioned Juror A, who said that he was frustrated that defendant's wife had been given immunity and knew the jurors' names and addresses, and because the trial was taking so long and he had missed a month of work. In response to the judge's questioning, Juror A said that he believed the defendant should be sentenced to death.

At this point, the trial court elected to replace Juror A with an alternate. The judge questioned the remaining members of the jury, as a group, and found that none had reached an opinion about the appropriate sentence. The court denied a defense request to question the remaining jury members individually about the actions of Juror A.

The court concluded that the trial judge did not abuse its discretion by leaving Juror A on the jury for the guilt/innocence stage. Juror A clearly stated that he had no final opinions and was waiting to hear all of the evidence, and agreed with the proposition that defendant was presumed to be innocent. Finally, Juror A stated that he threw his notes due to frustration that he was unable to keep up with the evidence, not due to any feelings about the defendant.

3. Furthermore, the trial court did not err by failing to question all of the jurors about the actions of Juror A. There was no reason to believe that any other juror had been affected by Juror A's conduct, and questioning the entire jury might have caused prejudice by calling attention to Juror A's actions.

Defendant's convictions and death sentence were affirmed. (See also **DOUBLE JEOPARDY**, §17-1).

People v. Bowens, 407 Ill.App.3d 1094, 943 N.E.2d 1249 (4th Dist. 2011)

1. Defendant waived the argument that the trial court erred by failing to excuse her spouse for cause.

The Appellate Court concluded that the issue was waived because, after the motion to excuse for cause was denied, counsel failed to exercise one of his two remaining peremptories.

Although counsel was only permitted to exercise peremptories within each panel of four veniremembers, and stated that he had allocated the two remaining challenges for use against two prospective jurors whom he knew would be in the final panel, the Appellate Court found that he should have used a peremptory against the judge's husband and then asked the judge for an additional challenge. By accepting the panel with the objectionable juror while he had peremptories remaining, counsel affirmatively acquiesced to the juror's service and waived the issue for appeal.

The court added that "a possible explanation for defense counsel's failure to use a peremptory challenge . . . might be counsel's attempt to plant a seed of error, the fruit from which defendant is now trying to harvest on appeal." A party cannot "intentionally fail to avail himself of the resources provided . . . only to complain about the result on appeal."

2. The court rejected the argument that the trial court's failure to excuse her spouse for cause could be reached as plain error. Plain error analysis can apply only to procedural default – the failure to make a timely assertion of a known right – and not where the defense affirmatively acquiesces to an error. In the latter situation, defendant's only recourse is to challenge counsel's acquiescence as ineffective assistance.

3. The court declined to address whether jury service by the trial judge's spouse might be *per se* reversible error if the defendant does not acquiesce. However, "[w]e note . . . that the record contains no suggestion of some compelling need for why the trial court thought it necessary for her spouse to serve as a juror in a case over which she presided, a circumstance which strikes this court as rather unusual."

4. In dissent, Justice Pope found that "where the trial judge goes home each night of three-day trial . . . to the same home where she resides with her husband-juror," the appearance of impropriety calls into question the fundamental fairness of the trial. Justice Pope also criticized the majority's failure to discuss the ramifications of having a judge's family member serve on the jury, including that: (1) the spouse might look unkindly on a defense attorney who engages in heated discussion with the judge, (2) the trial court might be called to inquire into allegations of juror misconduct against the spouse, and (3) other jurors might be unduly influenced by the spouse's view of the case. Justice Pope also noted that "it seems extremely unlikely defendant would have been successful in obtaining an extra peremptory challenge" after the judge denied a motion to excuse her spouse for cause.

Justice Pope also noted that other jurisdictions have found that it is error to allow the judge's family member to serve as a juror in a case over which the judge presides, even where no challenge for cause was made and there is no showing of actual prejudice.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

People v. Strawbridge, 404 Ill.App.3d 460, 935 N.E.2d 1104 (2d Dist. 2010)

Although defendant has a fundamental right to an unbiased jury, mere suspicion that a juror is biased does not justify disqualification. Whether to replace a juror is within the discretion of the trial court, whose decision will be disturbed only for an abuse of discretion.

The trial court did not abuse its discretion by refusing to replace a juror who attended the same church as the complainant. The complainant stated that although she knew the juror, they had not seen each other for four or five months. The complainant also stated that the two were not close friends.

The juror said that she recognized the complainant but did not know her very well. In fact, the juror did not recognize the complainant's last name, which had recently changed. The juror stated that she did not socialize with the complainant and could be impartial despite their relationship.

In view of the consistent statements by the juror and the complainant and the limited nature of their relationship, the trial court did not abuse its discretion by refusing to replace the juror.

(Defendant was represented by Assistant Defender Kathleen Weck, Elgin.)

Top

§32-5(b)
Publicity

Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961) Where a barrage of inflammatory publicity immediately prior to trial resulted in eight jurors forming opinions that defendant was guilty, a fair trial was impossible. See also, **Rideau v. Louisiana**, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963) where defendant's trial became a "hollow formality" after his "confession" was made into a 20-minute film and broadcast three times on television.

Press Enterprise v. Superior Court, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) *Voir dire* proceedings are open to the public, and may be closed only based on specific findings that closure is essential and alternatives are inadequate. See also, **People v. Gacy**, 103 Ill.2d 1, 468 N.E.2d 1171 (1984) (judge did not err in refusing to close *voir dire* to the public).

People v. Kirchner, 194 Ill.2d 502, 743 N.E.2d 94 (2000) During jury selection, the parties learned that several copies of a newspaper article describing the trial were in the jury assembly room before *voir dire*. *Voir dire* disclosed that only one of the jurors selected to hear the case had seen the article, and that juror said she could remain impartial. Three other jurors had seen articles about the case, but did not indicate whether they saw the article in the jury room. Two of these jurors merely glanced at or "skimmed" articles, and all three said they could remain impartial. The Supreme Court held that defendant was not denied an impartial jury. Mere exposure to publicity about a case does not necessarily violate the constitutional right to an impartial jury; a veniremember who is aware of a case may serve as a juror if capable of deciding the case solely on the evidence presented in court.

People v. Taylor, 101 Ill.2d 377, 462 N.E.2d 478 (1984) Due to the extensive publicity and the jurors' knowledge about the case, the trial judge erred by denying defendant's motion for change of place of trial. The Court emphasized that several of the jurors were aware that a co-defendant had been released due to insufficient evidence, and that three jurors knew that the release was the result of the co-defendant passing a lie detector test.

People v. Cain, 36 Ill.2d 589, 224 N.E.2d 786 (1967) Defendant was denied an impartial jury where one juror admitted seeing prejudicial newspaper headlines; the trial judge failed to conduct a meaningful examination of the juror, did not admonish juror not to discuss the headlines with other jurors, and did not instruct the jury to disregard newspaper articles.

People v. Olinger, 112 Ill.2d 324, 493 N.E.2d 579 (1986) The trial judge did not err by denying a motion for change of venue based on extensive publicity regarding the murders for which defendant was charged. The Court noted that there had been extensive publicity in the county including front page newspaper articles. However, there was "nothing in the record to indicate that any of the jurors actually accepted had been exposed to any of the prejudicial and inadmissible publicity. Moreover, none of the actual jurors had been challenged for cause by either defendant."

People v. Mack, 107 Ill.App.3d 164, 437 N.E.2d 396 (4th Dist. 1982) The trial judge granted defendant's change of venue motion and moved the trial from Livingston to McLean County (an adjacent county). The defendant alleged that the trial should have been moved to a more distant county, since a survey showed 78.3% of people interviewed in McLean County thought defendants were guilty or probably guilty. The Court held that the survey did not make the decision to hold the trial in McLean County erroneous, especially

since the trial judge "liberally granted defense challenges of prospective jurors for cause."

Cumulative Digest Case Summaries **§32-5(b)**

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2. There is no hard-and-fast formula that dictates the necessary depth or breadth of *voir dire*. Since jury selection is particularly within the province of the trial judge, reviewing courts should not second-guess a judge's estimation of juror impartiality. Applying these principles, the Supreme Court rejected Skilling's claim that the five-hour *voir dire* conducted by the trial judge was inadequate to detect juror bias. The Court noted in particular that the judge first screened jurors though a comprehensive written survey drafted in large part by defense counsel. The survey helped identify jurors excusable for cause and provided a springboard for further questioning. The judge conducted individual questioning of jurors, informing jurors that there were no right or wrong answers. The parties were provided an opportunity to conduct follow-up questioning. The seated jurors did not display bias.

The Supreme Court therefore concluded that Skilling did not establish that a presumption of juror prejudice arose or that actual bias infected the jury that tried him.

People v. Pelo, 404 Ill.App.3d 839, 942 N.E.2d 463 (4th Dist. 2010)

The defendant is entitled to a change of venue as a result of pretrial publicity if a reasonable apprehension exists that he cannot receive a fair and impartial trial. Mere exposure to pretrial publicity is not enough to demonstrate prejudice. The court must examine the "mood" of the jury actually empaneled, giving deference to the trial court's judgments regarding the ability of the jurors to be fair.

Two jurors admitted having formed an opinion regarding defendant's guilt as a result of pretrial publicity. The trial judge accepted assurances by both jurors that they could set that opinion aside and decide the case based on the evidence presented and the law provided by the court, though one juror admitted that it would be difficult. The Appellate Court found no error resulted from the denial of the motion for change of venue.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

Top

§32-6
Communication with Jury; Jury Examination of Evidence

§32-6(a)
Questions from Jury; Jury Review of Evidence

Weeks v. Angelone, 528 U.S. 225, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000) No constitutional error occurred where, in response to a capital jury's question whether it was required to impose a death sentence if it found that defendant was death-eligible, the trial court referred to a paragraph of an instruction that had already been given. The instruction to which the judge referred allowed the jury to consider mitigating evidence and the trial court gave an additional instruction specifically informing the jury that it was required to consider mitigation. In addition, defense counsel specifically asserted in closing argument that the jury could choose not to impose a death sentence even if it found that the aggravating factors were proven, the jury continued to deliberate for more than two hours after receiving the judge's answer, and after the verdict was returned each juror individually affirmed that he or she had considered mitigating evidence. Thus, there was no reasonable likelihood that the jury believed it was precluded from considering mitigating evidence.

People v. Hasprey, 194 Ill.2d 84, 740 N.E.2d 780 (2000) The trial judge did not err by responding to a jury note, sent before the close of evidence, asking how the jurors should vote if they felt that both parties were at fault. The trial court responded by indicating that the jurors should not discuss the case until they had heard all of the evidence and received instructions. Because defense counsel failed to object to the response or request a mistrial, any issue concerning the judge's response was waived. Furthermore, because the response cured any misunderstanding, the judge was not obligated to declare a mistrial *sua sponte*.

People v. Millsap, 189 Ill.2d 155, 724 N.E.2d 942 (2000) Illinois law requires that jury instructions be "settled" before closing arguments, so the parties may tailor their arguments to the instructions the jury will receive. By introducing the theory of accountability in response to a jury inquiry during deliberations, the trial court deprived the defendant of his constitutional right to make a closing argument on the "theory of guilt upon which he may have been convicted." The court noted that the evidence was close on whether there had been a second offender, but in the absence of an accountability instruction there was no reason for defense counsel to address that point in his closing argument. In addition, defendant had no opportunity to argue that the evidence failed to establish the elements of accountability, which differ from the elements of guilt as a principal. "If, as the State insists, an accountability instruction was appropriate in this case, the State should have asked for such an instruction at the proper time. It was too late for the State to change its theory of the case after the case had been sent to the jury. The court should not submit new charges or new theories to the jury after the jury commences its deliberations."

People v. Johnson, 146 Ill.2d 109, 585 N.E.2d 78 (1991) During its deliberations at a death penalty hearing, the jury sent a note to the judge requesting a psychiatric diagnostic manual and any reports of a psychiatrist who had testified. The judge did not inform either counsel of the jury's request, but told the jury that it had all the information it was going to get. The trial judge erred by not informing the parties about the jury's request. However, reversal was not required because the documents requested had not been admitted into evidence, and the trial judge therefore had no discretion to provide them in any event.

People v. Childs, 159 Ill.2d 217, 636 N.E.2d 534 (1994) Defendant was charged with murder and armed robbery; however, the jury was also instructed on involuntary and voluntary manslaughter as lesser-included offenses. Defendant claimed that the shooting in question had been accidental and occurred while he was struggling with the decedent over the latter's gun. The State contended that the offense occurred when defendant attempted to commit an armed robbery. During deliberations, the jury sent a note to the trial judge asking whether it could convict of both armed robbery and manslaughter. The trial court directed the jury to read the instructions and continue to deliberate. The judge informed the prosecutors of the question and his response, but did not attempt to contact defense counsel. The jury eventually returned verdicts convicting

defendant of murder and armed robbery.

The Supreme Court remanded the cause for a new trial. First, the judge erred by refusing to respond to the jury's questions. A trial judge may decline to answer jury questions where the instructions are readily understandable and explain the relevant law, where further instructions would be misleading, or where the answer would express an opinion that would likely direct a verdict for one side or the other. However, explicit questions and those requesting clarification about points of law must be answered. The jury here asked an explicit question about a substantive legal issue - whether it was required to find the defendant guilty of murder if it convicted him of armed robbery. The instructions were potentially confusing on this issue; the jury had received instructions but no verdict forms on felony murder, and the wording of one instruction may have created the impression that a manslaughter conviction required an accompanying conviction for murder. Furthermore, the trial court's confusion about the precise nature of the question required it to seek clarification instead of merely refusing to respond. The Court also held that because an *ex parte* communication between the judge and jury violates a defendant's constitutional rights to appear and to participate in all proceedings, the trial court should have contacted defense counsel before deciding not to respond to the jury's questions. See also, **People v. Oden**, 261 Ill.App.3d 41, 633 N.E.2d 1385 (5th Dist. 1994) (the trial court erred by failing to give supplemental instructions in response to explicit questions about the doctrine of constructive possession, and by failing to notify defense counsel of the question.)

People v. Queen, 56 Ill.2d 560, 310 N.E.2d 166 (1974) The jury sent a request to the judge that it "would like the defendant's words on the stand." The trial judge replied, "[Y]ou must decide on the basis of the testimony heard in the courtroom. I cannot have any testimony of any witnesses read to you." The Supreme Court reversed the conviction, holding that the trial court's reply was a declaration that the judge lacked discretion to allow the jury's request for a review of testimony.

People v. Franklin, 135 Ill.2d 78, 552 N.E.2d 743 (1990) The court did not abuse its discretion in refusing the jury's request for specific portions of a witness's testimony. The trial court noted that it would have been required to excise portions of the testimony to accommodate the jury's request, and it feared this would confuse the jury and highlight sections of the testimony which should have been still fresh in the juror's minds, since they had heard it the previous day.

People v. Olinger, 112 Ill.2d 324, 493 N.E.2d 579 (1986) The jury asked to see transcripts of the testimony of several witnesses. The judge had an off-the-record discussion with the parties, and over defense objection sent the jury a note stating, "No, the transcripts are not available. You must rely on your memories." A judge may furnish the jury with transcripts of testimony if he, within his discretion, believes the transcripts will be helpful.

People v. Reid, 136 Ill.2d 27, 554 N.E.2d 174 (1990) Defendant was charged with murder and armed robbery. During deliberations, the jury asked whether it could find defendant guilty of one charge and not guilty of the other. The judge contacted counsel and said he was going to respond that the jurors should continue deliberating on the basis of the instructions they had received. The Supreme Court held that the trial judge did not err in his response to the jury question. Although the trial court had discretion to directly answer the jury's question by stating that the jury could find defendant guilty on one count and not guilty on the other, it "had no duty to do so under the circumstances of this case." The jury received a complete set of written instructions, and the judge "apparently determined that the jury was not manifestly confused" and "that the written instructions settled any confusion the jury displayed."

People v. McDonald, 168 Ill.2d 420, 660 N.E.2d 832 (1995) Where defendant represented himself at the death penalty hearing, the trial court erred by responding to the jury's questions during deliberations without informing defendant that a communication had been received. However, defendant suffered no prejudice

from the *ex parte* communication where standby counsel was present and the trial judge declined to answer the jury's questions.

People v. Pulliam, 176 Ill.2d 261, 680 N.E.2d 343 (1997) During deliberations at the sentencing stage of the death penalty case, the jury sent the following note to the trial judge: "What happens if we cannot reach a unanimous decision on either verdict?" The Supreme Court held that the trial court did not err by responding, "You have your instructions. Keep deliberating." The trial judge has a duty to provide clarification where the jury poses an explicit question on a point of law arising from facts about which there is doubt or confusion. Here, however, the jury had been explicitly instructed that it could not sign a death verdict unless the vote was unanimous, and the instructions already given were readily understandable.

People v. Andrews, 364 Ill.App.3d 253, 845 N.E.2d 974 (2d Dist. 2006) The trial judge declined to answer a jury's question whether there had been testimony on where a vehicle had been found. Generally, the trial judge has the duty to provide instruction when the jury poses an explicit question or requests clarification on a point of law about which there is confusion. However, the trial court may refuse to answer a question involving a factual matter.

People v. Derr, 346 Ill.App.3d 823, 806 N.E.2d 237 (5th Dist. 2004) The trial judge may decline to answer jury questions concerning the law where: (1) the instructions are readily understandable and explain the relevant law, (2) further instructions would be misleading, or (3) the answer would express an opinion that would likely direct a verdict for one side or the other. Otherwise, explicit requests for clarification of the law must be answered. "The law expects trial judges to assist confused jurors when they express a lack of understanding about the application of instructions to the facts they must weigh." The trial court abused its discretion here by giving a non-IPI instruction that may have confused the jury. The jury had asked whether, to prove felony murder predicated on robbery, the State had to show that the offense of robbery occurred "during" the acts which caused death. Instead of responding "yes", the judge responded with a non-IPI instruction which informed the jury that although the death and robbery need not be "contemporaneous," there must be "some concurrence" between the force and the taking of the property. The Appellate Court found that the phrase "some concurrence" would be clear to lawyers and judges, but might be difficult for layman and possibly lead to a belief that defendant could be convicted of felony murder even if he removed valuables from the decedent's body several hours after the death.

People v. Griffin, 351 Ill.App.3d 838, 815 N.E.2d 52 (4th Dist. 2004) Where defendant was charged with first degree murder and involuntary manslaughter, and the jury sent a note during deliberations asking to have the difference between "knowledge" and "intention" explained, the trial court erred by instructing the jury with paragraph 1 of IPI Crim. 4th No. 5.01B, which defines "knowledge" in terms of prohibited conduct, rather than paragraph 2 of the instruction, which defines "knowledge" in terms of a prohibited result. Because the issue at trial was whether the defendant performed the acts recklessly (in which case she would be guilty of involuntary manslaughter) or with knowledge of a strong probability of death or great bodily harm (in which case she would be guilty of first degree murder), the failure to give the correct definition of "knowledge" constituted plain error.

People v. Lowry, 354 Ill.App.3d 760, 821 N.E.2d 649 (1st Dist. 2004) Where the defendant was charged with attempt first degree murder, aggravated battery with a firearm and armed robbery, the trial court abused its discretion by refusing to give a clarifying instruction where the jury asked for the meaning of the word "knowingly" and whether a "knowing" act could be "accidental." Because knowledge was an element of the charged offense, the jury's question was one of substantive law.

People v. Murray, 364 Ill.App.3d 999, 848 N.E.2d 160 (4th Dist. 2006) A conviction for home invasion was

reversed and the cause remanded for a new trial, because the trial court gave an incorrect statement of Illinois law in responding to a jury question.

People v. Parham, 377 Ill.App.3d 721, 879 N.E.2d 1024 (2d Dist. 2007) The trial court erred by failing to give a direct answer to the jury's question as to whether it could presume, from the mere fact of the indictment, that a crime had occurred. The question showed a fundamental misunderstanding of the criminal process, undermined the presumption of innocence, and denigrated the State's burden of proof. By merely restating instructions which had previously been given, none of which directly addressed the question, the judge failed to clearly inform the jury that it could not assume that a crime had occurred.

People v. Brown, 319 Ill.App.3d 89, 745 N.E.2d 173 (4th Dist. 2001) Where the jury asked whether it could convict "on this charge based on" an incident which had been admitted as other crimes evidence, the trial court erred by merely responding that the jury was required to follow its instructions concerning the use of the other crimes evidence. The trial judge should have informed the jury that it could not consider the other crimes evidence except on the issues of intent, knowledge and lack of accident. Even where the jury has been properly instructed, the trial court should specifically and accurately respond to explicit questions or requests for clarification on points of law arising from facts about which there is no doubt or confusion. The jury's question "clearly suggests the jury was having serious difficulties dealing with the concept of the limited purpose for which the other-conduct evidence was admitted."

People v. Hill, 315 Ill.App.3d 1005, 735 N.E.2d 191 (1st Dist. 2000) Reversible error occurred where, after the trial judge left the courthouse during deliberations, a substitute judge refused to answer the jury's questions because he was "not familiar with the evidence in the case." A trial court may, in its discretion, decline to answer jury questions where the instructions are legally correct and understandable, further instruction would mislead the jurors, the jury's questions raise issues of fact, or an answer might direct a verdict for one party or the other. However, the trial court has the duty to instruct the jury where clarification is requested, the original instructions are incomplete, or the jurors are "manifestly confused." The substitute judge did not exercise his discretion to decline to answer the questions, but said he would not answer because he was not familiar with the evidence. Thus, the judge "chose to abstain from making a decision. . . [A]bstention is not an appropriate response from a trial judge."

People v. Long, 316 Ill.App.3d 919, 738 N.E.2d 216 (1st Dist. 2000) The Court reversed defendant's conviction because, at the jury's request, the trial judge sent to the jury room an arrest report that had not been admitted into evidence. The court concluded that the error was not harmless; the case involved credibility questions, and the report, which quoted defendant making several profane statements, both reinforced the arresting officer's testimony and "paint[ed] a picture of defendant that, at best, is not flattering."

People v. Comage, 303 Ill.App.3d 269, 709 N.E.2d 244 (4th Dist. 1999) Where the jury raises an explicit question manifesting confusion on a substantive legal issue, the trial court is obligated to respond unless the instructions are sufficient to explain the relevant law, further instructions might mislead the jury or otherwise serve no useful purpose, the inquiry involves an issue of fact, or answering the question would cause the court to express an opinion that would likely direct a verdict. A jury inquiry about "the legal definition of a single word without relating it to any particular fact of the case," raises an issue of law rather than one of fact. The trial court has a duty to clarify the instructions even where the word or phrase in question has a plain meaning within the jury's common knowledge. Once the jury requests clarification, the ultimate issue is not whether the instructions were legally adequate, but whether they were clearly understandable to the jury. Where the jury's question related to a substantive question of law (the definition of the required mental state for the offense), could have had a significant effect on the case because the jury might have been

confused as to the precise elements to which the mental requirement applied, and the trial court failed to give IPI Crim. 3d No. 5.01B[1], which defines the term in question, the trial court erred by refusing to answer the jury's question.

People v. McLaurin, 382 Ill.App.3d 644, 889 N.E.2d 1124 (1st Dist. 2008) A criminal defendant has a constitutional right to appear and be present during each critical stage of his trial. Jury deliberations are a critical stage. Thus, the defendant has the right to be personally present when communications from the jury are considered. As a matter of plain error, the trial court erred by excluding the defendant from conferences at which the trial court and the attorneys considered notes received from the jury during deliberations. The trial court also erred by directing the sheriff to tell the jury to continue to deliberate. Any communication between the judge and jury during deliberations should have occurred in open court and in the defendant's presence.

People v. Falls, 387Ill.App.3d 533, 902 N.E.2d 120 (1st Dist. 2008) Whether and how to answer questions asked by jurors during deliberations is generally left to the discretion of the trial court, whose ruling will be disturbed on appeal only for an abuse of discretion. However, if jurors ask the trial court to clarify the law, the court must do so. Where it was clear that the jury was concerned about whether a defendant charged with resisting a peace officer must have *physically* resisted, and the instruction given by the judge was silent on the Illinois requirement that the offense of resisting a peace officer requires a "physical act" that is intended to interfere with the officer's exercise of his duties, the trial court erred by failing to give further clarification. The court noted that the jury acquitted defendant on a battery charge premised on the assertion that defendant struck the officer, and may have erroneously convicted of resisting a peace officer even if it believed the defendant did not engage in a "physical act."

People v. DeRossett, 237 Ill.App.3d 315, 604 N.E.2d 500 (4th Dist. 1992) Defendant was convicted of criminal trespass to real property because he returned to the Urbana Police Station after being escorted to the street and told not to come back. During deliberations, the jury sent a note asking whether defendant had been told not to reenter the police station under any circumstances, or whether he had been told only that he could not return until he had legitimate business. Over objection, the court had the court reporter read to the jury incriminating testimony from the officer's *redirect* examination. The trial judge abused his discretion because on direct examination, the witness had testified that defendant was told he would be arrested if he reentered the station *and continued to create problems*. On redirect examination, the officer merely agreed with the prosecutor's leading questions which implied that the defendant could return under no circumstances. At issue was whether defendant had sufficient notice that returning to the station would cause him to be arrested; reading only the redirect ignored significant evidence and implied that it was irrelevant whether defendant had been told that he could return on legitimate business.

People v. Kamide, 254 Ill.App.3d 67, 626 N.E.2d 337 (2d Dist. 1993) The State presented evidence that the breathalyzer taken by the defendant registered a blood alcohol level of .14%. However, defendant claimed that he had inhaled several sprays of Ventolin, an asthma drug, before he was pulled over by the officer. A defense expert testified that the breathalyzer determines blood alcohol levels by measuring the infrared absorption qualities of alcohol, and that albuterol, the active ingredient of Ventolin, absorbs infrared light at the same level as ethyl alcohol. Thus, albuterol registers as alcohol on the breathalyzer. During its deliberations, the jury sent the judge a note asking whether consumption of Ventolin is "considered consumption of alcohol?" The trial court responded that the jury was to decide the case on the testimony, exhibits and instructions it had already received. The Appellate Court held that the trial judge erred by failing to answer the jury's question. In adopting the DUI provisions of the Vehicle Code, the legislature intended to prohibit the operation of motor vehicles only by drivers who are under the influence of ethyl alcohol. Where the jury raises "an explicit question on a point of law arising from the facts over which there is doubt

or confusion," the trial judge should attempt to clarify the confusion. Here, the jury's question showed its confusion over the legal meaning of the word "alcohol," and the evidence demonstrated that the defendant may have consumed a type of alcohol not proscribed by the Illinois Vehicle Code. The trial court committed reversible error by refusing to answer the question.

People v. Landwer, 279 Ill.App.3d 306, 664 N.E.2d 667 (2d Dist. 1996) Defendant presented an entrapment defense, and the jury was instructed with an instruction which states that entrapment does not exist if a police officer "merely afforded" an opportunity to commit an offense in furtherance of a "criminal purpose which the defendant originated." During deliberations, the jury sent a note to the judge asking for clarification of the word "originated." The judge responded by saying that the word "has a commonly understood and accepted meaning, and needs no further definition." Approximately 30 minutes later, the jury requested a dictionary. The trial judge clarified that the purpose of the dictionary was to determine the meaning of the word "originate," and refused to provide a dictionary. The Appellate Court held that the trial judge erred by refusing the jury's request for clarification. Illinois law requires that the trial court clarify jury confusion about questions of law, even where the jury was properly instructed and the defense failed to tender an appropriate instruction. In addition, where the failure to instruct the jury precludes it from considering a viable defense, the error may be considered on review despite the defense's failure to properly preserve the issue. Here, the jury raised an explicit question - the definition of one word. Furthermore, the question was one of law, since "originated" appears both in the pattern instruction and in the statute defining the entrapment defense. Finally, since there were repeated requests for definition of the same term, the record clearly shows jury confusion.

People v. Morris, 81 Ill.App.3d 288, 401 N.E.2d 284 (2d Dist. 1980) At defendant's trial for burglary, the jury sent the trial judge the following question. "If a person comes into possession of property obtained illegally by another, can he be presumed guilty of burglary even though he, himself, may never have illegally entered the building or removed the property?" The jury had not been instructed on accountability, and the trial judge responded: "Not a proper question! You must decide the case on the instructions as given." The trial judge's failure to give additional instructions was reversible error. The jury's question clearly evidenced confusion and the jury may have convicted defendant on the basis of accountability, which was not charged.

People v. Brouder, 168 Ill.App.3d 938, 523 N.E.2d 100 (1st Dist. 1988) At defendant's trial for resisting arrest, the jury sent several notes to the judge indicating that it was confused. Specifically, the jury twice asked "what defines knowingly resisting arrest?" Also, the jury notes stated: "We are confused as to the knowingly resistance to be arrested. Does it mean a mental state of refusing to be arrested and thereby running away, or physically fighting? Will a step or two away mean resistance." The trial judge replied to the jury: "You have heard all of the evidence. You have been given the instructions. Continue your deliberations." Thereafter, defense counsel tendered an instruction defining "knowingly." The judge reserved ruling on this instruction but before a ruling was made, the jury returned a guilty verdict. The Appellate Court concluded that the jury demonstrated confusion as to a question of law and the trial court committed reversible error by refusing to provide the jury with the tendered instruction defining "knowingly." Compare, **People v. Sandy**, 188 Ill.App.3d 833, 544 N.E.2d 1248 (4th Dist. 1989) (judge did not err in failing to instruct on the definition of knowing conduct where the jury did not request it).

People v. Gregory, 184 Ill.App.3d 676, 540 N.E.2d 854 (2d Dist. 1989) Defendant was charged with burglary and criminal trespass. The foreman of the jury told the judge that the jurors had reached a verdict, and the judge read verdicts of guilty on both charges. A juror then told the judge to read the burglary verdict again, and the judge saw that it was signed by only ten jurors. Out of the hearing of the jury, the judge informed counsel that there were twelve signatures on the criminal trespass verdict but only ten on the

burglary. The judge then sent the jury back to deliberate. Within an hour, the jury returned with unanimous guilty verdicts on both charges. The Appellate Court held that the trial judge's actions "imposed such pressure on the jury as to render the accuracy and integrity of its verdict uncertain. The jury could well have concluded the judge's inattention to the detail of the verdict form was born of his expectation that the jury would return guilty verdicts. Even after his attention was drawn to the burglary verdict forms, he failed to observe the split, thus reinforcing the notion the guilty verdict was expected."

People v. Watson, 107 Ill.App.3d 691, 438 N.E.2d 453 (3d Dist. 1982) A judge has broad discretion in allowing exhibits to be taken to the jury room including such items as bloodstained clothing.

People v. Robinson, 125 Ill.App.3d 1077, 467 N.E.2d 291 (1st Dist. 1984) A police photo album ("mug shot" book), containing defendant's picture, was submitted to the jury. The album was used during examination of witnesses, there was extensive testimony about defendant's appearance on the day of the crime and the sole defense witness testified that he was unable to identify the perpetrator in the album. Since "the defense was based on misidentification and identification was a primary issue," the "probative value of the 'mug shot' book outweighs any prejudicial effect."

People v. Fisher, 281 Ill.App.3d 395, 667 N.E.2d 142 (2d Dist. 1996) The trial court can not inform a jury, before deliberations began, that any requests for transcripts of testimony will be refused. The court must exercise its discretion whether to allow a transcript at the time the request is made, and may not "preempt a future request with a blanket admonition" before deliberations begin.

People v. Tansil, 137 Ill.App.3d 498, 484 N.E.2d 1169 (2d Dist. 1985) The defense at trial was insanity. During deliberations, the jury requested a write-up of the opinions of medical experts who had testified regarding their psychiatric evaluations of the defendant. The request was made at 9:30 p.m., and the trial judge refused the request after making several unsuccessful attempts to contact defense counsel. The jury continued deliberations until 10:00 p.m., reconvened the next day at 9:00 a.m. and returned guilty verdicts at 11:00 a.m. The judge then stated on the record that he told the jury, *inter alia*, that it "is not permitted to receive the testimony or parts of the testimony of the witnesses in writing." The Appellate Court found that defendant had been denied a fair trial. First, it was reversible error for the trial judge to consider and respond to the jury's request without the defendant being present. The requested medical testimony was "highly pertinent to the jury's deliberations, and may well have been crucial to the defendant's insanity defense." In addition, the trial judge committed reversible error by instructing the jury that it was not permitted to review the testimony of witnesses. It is within the trial judge's discretion to allow or refuse a jury's request to review testimony, and "we interpret the judge's response to the jury here as an assertion that he had no discretion to consider the request."

People v. Davis, 105 Ill.App.3d 549, 433 N.E.2d 1376 (4th Dist. 1982) Defendant was sentenced to imprisonment when the jury could not unanimously agree on a sentence of death. After the verdict but before the death penalty sentencing hearing, the defendant moved for a mistrial on the ground that the bailiff had failed to tell the trial judge of the jury's request for a transcript of testimony. The trial judge stated that such a request had been made and that he would have granted the request for one item of the transcript. The judge then offered to set aside the verdict, give the jury the item requested and allow the jury to deliberate further. When defendant objected to this procedure, the judge denied the motion for mistrial. The Appellate Court held that the actions of the bailiff were "egregiously wrong" and that the trial judge erred by finding the error harmless. The trial court "may not speculate as to reasons for the request and especially may not decide on its own that the testimony requested is not critical." This is especially true here, where the evidence was largely circumstantial and conflicting. The trial judge's proposed solution to the problem was erroneous. "Once a verdict has been rendered, accepted by the court, and judgment entered thereon, and the jury has

separated, the Court has lost control of the verdict, and the only remedies are either mistrial or some variety of post-trial relief, such as judgment n.o.v. or new trial."

People v. Tomes, 284 Ill.App.3d 514, 672 N.E.2d 289 (1st Dist. 1996) During deliberations for attempt first degree murder and aggravated discharge of a firearm, the jury sent a note to the trial court stating that it had reached a decision on the aggravated discharge of a firearm charge but was "split" on the attempt murder charge. The note asked if the aggravated discharge count could "stand on itself." The court responded, "[P]lease continue to deliberate on the charge of attempt first degree murder." Defendant was subsequently convicted of both offenses. The Appellate Court held that the trial judge's instruction to continue deliberating, while "certainly susceptible to an innocent construction, . . . is also susceptible to a construction that directs a verdict of guilty as to attempt murder." The Court stressed that the response improperly implied that a verdict of guilty of aggravated discharge of a firearm could not "stand alone" and that the jurors should resolve their indecision by convicting defendant of attempt murder.

Cumulative Digest Case Summaries **§32-6(a)**

People v. McLaurin, 235 Ill.2d 478, ___ N.E.2d ___ (2009) (No. 106736, 12/17/09)

1. To preserve a claim of error for review, counsel must both object to the error at trial and raise the error in the post-trial motion. Although judicial misconduct may provide a basis for excusing forfeiture, this rule is applied only where errors are so serious as to threaten the integrity of the judicial process. The court stressed that the rule allowing judicial misconduct to excuse a forfeiture, which was first recognized in **People v. Sprinkle**, 27 Ill.2d 398, 189 N.E.2d 295 (1963), is based not only on the difficulty of objecting to the trial court's improper actions, but also on the risk that the jury might view the defendant unfavorably due to his objection to the conduct of a judge.

The **Sprinkle** rule did not excuse defense counsel's failure to object to defendant's absence when the trial court considered several notes from the jury. Because this was not a case in which the trial court overstepped its authority in the presence of the jury and counsel was in no way prevented from raising an objection, there were no extraordinary compelling reasons to relax the forfeiture rule.

2. The plain error doctrine allows a reviewing court to remedy a clearly obvious error, despite a waiver, where the evidence is so closely balanced that the jury's verdict may have resulted from the error, or where the error is so serious that the defendant was denied a substantial right and thus a fair trial. Before addressing either prong of the plain error doctrine, the court must first determine whether a clear or obvious error occurred.

The right to be personally present at trial is not an absolute right under either the Federal or Illinois Constitutions, but is instead a right which is intended to secure other, substantive rights of the defendant. Thus, the right to be personally present is violated under Illinois law only if defendant's absence results in the denial of an underlying substantial right, and under the Federal Constitution only if a fair trial has been denied. Because defendant was not denied any substantive right where communications from the jury were considered in his absence but in the presence of counsel, and because defendant was neither denied a substantial right nor a fair trial, reversal was not required.

The court rejected defendant's claim that had he been present he could have urged the court to adopt a different course of action from that which his counsel recommended. The trial court's actions taken in response to the communications from the jury (i.e., providing transcripts and responding to a claim that the jury was deadlocked) were well within the court's discretion.

3. The court rejected defendant's argument that the trial court committed plain error by sending a bailiff to the jury room to deliver an oral message to the jury to "keep on deliberating," after the jury had indicated twice that it was deadlocked. Defendant failed to carry his burden under the plain error rule where he failed to allege any specific prejudice which resulted from the instruction and there was no basis to believe

that the bailiff did anything other than deliver the judge's message.

(Defendant was represented by Assistant Defender Manuel Serritos, Chicago.)

People ex rel. City of Chicago v. Le Mirage, 2013 IL App (1st) 093547 (Nos. 1-09-3547 & 1-09-3549 cons., 11/14/13)

A trial court must instruct a jury that has posed an explicit question or asked for clarification on a point of law. This is true even where the jury was properly instructed prior to deliberation. A trial court may refuse to answer a jury's question if the instructions already given are readily understandable and sufficiently explain the law, further instruction would not be useful or may mislead the jury, the jury's inquiry is ambiguous, or answering the question would require expressing an opinion that would likely direct the verdict.

The court instructed the jury that to convict defendants of indirect criminal contempt it must find that defendants willfully violated a court order, but the court did not provide the jury with IPI Criminal 4th No. 5.01B, which defines the mental state of knowledge and informs the jury that conduct performed knowingly or with knowledge is performed willfully. After the jury began to deliberate, it asked the court to define "willfully."

The term "willfully" has no plain or ordinary meaning. It may mean intentionally or knowingly depending on context. To the extent that Illinois equates willfulness with knowledge, rather than intent, it is out of step with other jurisdictions, as well as the term's common meaning. Therefore, when the jury exhibited confusion regarding the meaning of the term by asking for a definition, the court erred in failing to give the jury IPI Criminal 4th No. 5.01B.

While finding error, the Appellate Court declined to find plain error because the evidence was not closely balanced on the issue of defendants' willful violation of the court's order, nor was the error so serious that it affected the fairness of the trial.

People v. Brown, 406 Ill.App.3d 1068, 952 N.E.2d 32 (4th Dist. 2011)

When a deliberating jury asks an explicit question or requests clarification on a point of law arising from facts about which there is doubt or confusion, the judge is usually required to provide further instruction. The trial court may refuse to answer, however, if: (1) the instructions are readily understandable and sufficiently explain the relevant law; (2) further instruction would serve no useful purpose or might mislead the jury; (3) the inquiry involves a question of fact; or (4) answering the question would cause the court to express an opinion that could potentially direct a verdict. If the trial court elects to provide instruction to the jury during deliberations, it must refrain from instructing on new theories of the case. Both parties are entitled to instructions pertaining their theories of the case if supported by the evidence.

Where the evidence was conflicting whether the defendant was an initial aggressor, the trial court did not err by giving IPI Crim. 4th, No. 24-25.09, which states that an initial aggressor is justified in the use of force only where he reasonably believes that he is in imminent danger of death or great bodily harm and has exhausted every reasonable means to escape other than using force, in response to the jury's query whether an initial aggressor is required to attempt to escape before using force. Although IPI Crim. 4th, No. 24-25.09 had been refused by the trial court when tendered by the State at the instruction conference, the instruction would have been proper because the evidence was conflicting and the State argued that the defendant was the aggressor. Similarly, the instruction was appropriate in response to the jury's question because the jury was required to resolve the conflicting evidence, the instruction was directly related to a question about the law, the instruction did not direct a verdict, and the trial judge was not injecting a new theory in the case.

(Defendant was represented by Assistant Defender Mike Vonnahmen, Springfield.)

People v. Coleman, 391 Ill.App.3d 963, 909 N.E.2d 952 (4th Dist. 2009)

Although defense counsel may not waive the defendant's right to be personally present during communication between the trial court and the jury, reversal is required only if prejudice resulted. The State carried its burden to prove that the error was harmless beyond a reasonable doubt where the jury's only

request was for a definition of the term "abate," and after conferring with counsel the trial court responded with an accurate definition. The court stressed that defendant's presence would have had no substantial relationship to his opportunity to defend against the charge.

(Defendant was represented by Assistant Defender Allen Andrews, Supreme Court Unit.)

People v. Coots, 2012 IL App (2d) 100592 (No. 2-10-0592, 4/16/12)

The trial court has a duty to provide instruction to the jury where it has posed an explicit question or requested clarification on a point of law arising from facts about which there is doubt or confusion. This is true even though the jury was properly instructed originally. Reversible error can occur when the jury asks the trial court to define a key term used in the instructions but the court refuses the request.

Defendant was charged with the commission of drug-induced homicide, which required that she unlawfully deliver a controlled substance to another where that person's death was caused by ingestion of the controlled substance. 720 ILCS 5/9-3.3(a). The trial evidence allowed the jury to find that defendant either merely jointly possessed the controlled substance with the deceased, or that she delivered the controlled substance to the deceased.

During deliberations, the jury sent a note reading, "With respect to the definition of the term 'delivery,' may the jury reasonably interpret the term to mean 'give[?]'" With the agreement of the parties, the court told the jury to refer to its instructions, which did not include a complete definition of "delivery."

The jury's question demonstrated that it was confused about a question of law and was at least entertaining the belief that defendant could be found guilty by doing no more than handing the heroin to the deceased, which would be legally insufficient to support a guilty verdict. While the Appellate Court held that defense counsel was ineffective in failing to request the complete instruction defining "delivery," and noted that the judge erred in failing to answer the jury's question, it concluded that it could not hold that the trial court reversibly erred because defendant acquiesced in the mistake.

(Defendant was represented by Assistant Defender Barbara Paschen, Elgin.)

People v. Davis, 393 Ill.App.3d 114, 913 N.E.2d 536 (1st Dist. 2009)

1. Under Illinois law, a jury is entitled to have its questions answered. The trial judge has a duty to provide instruction to the jury where it imposes an explicit question or point of law arising from facts over which there is doubt or confusion. However, the court may in its discretion decline to answer a jury's question where the instructions are readily understandable and sufficiently explain the law, where further instruction would serve no purpose or potentially mislead the jury, where the inquiry involves a question of fact, or where providing an answer would cause the court to express an opinion that would likely direct a verdict one way or the other.

2. Where the jury asked whether the death penalty had been "taken off the table" to get the defendant to confess, and there had been no evidence at trial concerning the applicability of the death penalty, the trial court erred by responding, "no, please continue your deliberations." On its face, it appeared that the jury's question concerned the circumstances surrounding defendant's confession and whether the possibility of a death sentence had been used as a bargaining chip to elicit a confession. By answering, "[N]o," the judge submitted new evidence that had not been introduced at trial, bolstered the reliability of defendant's confession, and undermined defendant's theory of the case, which was to discredit the reliability of the confession by showing that it was fabricated or coerced.

The court rejected the State's argument that the trial court's response was based on the fact that it had presided over the suppression hearing, and therefore knew that no evidence had been presented to show that a death sentence had been used as a bargaining chip. First, the jury may base its decision only on facts obtained at trial, not those disclosed at pretrial hearings. Second, the judge did not purport to have relied on any evidence learned at the suppression hearing. Finally, any such reliance would have been error because the judge would have known only that no evidence on this point had been presented at the suppression hearing, not whether the possibility of a death sentence had come up during interrogation.

3. The court rejected the argument that the erroneous response was harmless, noting that the jury deliberated for more than six hours before asking the question, was sequestered overnight, twice indicated that it was at an impasse, and returned a verdict within twenty minutes after receiving the improper response. Furthermore, defendant's confession was the primary evidence of his participation in the crime; the only other evidence was the testimony of two eyewitnesses who initially failed to identify defendant and whose credibility was impeached. Finally, a confession is the most powerful piece of evidence the State can offer – a judge's erroneous response underscoring the credibility of a confession is likely a critical point in the jury's deliberations.

(Defendant was represented by Assistant Defender Maya Szilak, Chicago.)

People v. Hasselbring, 2014 IL App (4th) 131128 (No. 4-13-1128, 11/24/14)

A judge is required to answer questions from the jury if clarification is requested, the original instructions are incomplete, the jurors are confused, or the question concerns "a point of law arising from facts over which doubt or confusion exists." But in answering the jury's questions, a judge may not misstate the law or infringe on the province of the jury. And a judge should not answer a question requiring a conclusion on the issues at trial, or express an opinion that would direct a verdict.

Here defendant was charged with aggravated driving with a drug, substance, or compound in his breath, blood, or urine. 625 ILCS 5/11-501(a)(6), (d)(1)(F). The trial evidence showed that defendant had Benzoylecgonine, a cocaine metabolite but not itself a controlled substance, in his blood and urine. During deliberations, the jury sent a question to the court asking if "the cocaine metabolite" qualified as a substance. Over defendant's objection, the trial judge answered the question by stating that the cocaine metabolite qualified as a drug, substance, or intoxicating compound. Approximately 30 minutes later, the jury found defendant guilty.

The Appellate Court held that the judge's answer was improper. The ultimate issue here was whether defendant had a drug, substance, or compound in his blood or urine resulting from his use of cocaine. The jury only asked whether the metabolite was a substance, but the court went beyond the question and answered that it was also a drug and an intoxicating compound. This answer essentially directed a verdict for the State and resolved the ultimate issue for the jury. Additionally, since there was no evidence that the metabolite was an intoxicating compound, the answer conflicted with the evidence.

Defendant's conviction was reversed and remanded for a new trial.

People v. Laabs, 2011 IL App (3d) 090913 (No. 3-09-0913, 10/18/11)

The general rule when a trial court is faced with a question from the jury is that the court has a duty to provide instruction to the jury when the jury has posed an explicit question or requested clarification on a point of law arising from facts about which there is doubt or confusion. Nevertheless, a trial court may exercise its discretion to refrain from answering a jury question under appropriate circumstances. One such circumstance is where an answer would result in the submission of new charges or new theories to the jury after the jury commenced its deliberations. A response to a jury's question in that circumstance impinges on defendant's constitutional right to make a closing argument to the jury. **People v. Millsap**, 189 Ill.2d 155, 724 N.E.2d 942 (2000).

The State charged defendant with felony murder and allowed four accomplices to plead only to the underlying felony in return for their testimony against defendant. The prosecution proceeded on the theory that defendant was the principal. Defense counsel argued that the accomplices named defendant to avoid being charged with felony murder and that the accomplices' testimony that they were not present when the shooting occurred was not credible. During its deliberations, the jury asked if under Illinois law all robbers are liable for the murder if one of the robbers commits murder during a robbery. The court answered, "Yes," and instructed the jury on the law of accountability.

The Appellate Court found that the court erred in instructing the jury on a new theory of guilt during deliberations in response to the jury's question. The error was not harmless, despite the State's arguments

regarding the strength of the evidence, because defense counsel had no opportunity to address the accountability theory in closing argument. Defense counsel's brief comment in closing statement, that one of the accomplices was the shooter (to which an objection was sustained), was not sufficient to interject the issue of accountability into the case and invite the error. The court refused to speculate what prompted the jury to pose the question. Even if the court were to conclude that the error was invited, it "found no authority to suggest that invited error, however slight, would allow us to ignore the clear precedent" of **Millsap**.

(Defendant was represented by Assistant Defender Susan Wilham, Springfield.)

People v. McSwain, 2012 IL App (4th) 100619 (No. 4-10-0619, 1/18/12)

The trial court has a duty to provide instruction to the jury where it has posed an explicit question or requested clarification on a point of law arising from facts about which there is doubt or confusion. This is true even though the jury was properly instructed originally. When a jury makes explicit its difficulties, the court should resolve them with specificity and accuracy.

A court may, however, exercise its discretion and decline to answer a question from the jury in certain circumstances. Appropriate circumstances include when the instructions are readily understandable and sufficiently explain the relevant law, when additional instructions would serve no useful purpose or may potentially mislead the jury, when the jury's request involves a question of fact, or when giving an answer would cause the trial court to express an opinion likely directing a verdict one way or the other.

Determining the propriety of the trial court's response to a jury question involves a two-step analysis. First, it must be determined whether the trial court should have answered the jury's question. A court reviews the trial court's decision on this point for abuse of discretion. Second, it must be determined whether the court's response to the question was correct. This is a question of law reviewed *de novo*.

In a prosecution for child pornography requiring proof of a "lewd exhibition" of certain body parts, the jury requested a definition of "lewd." The court provided the six-factor definition set forth in **People v. Lamborn**, 185 Ill.2d 585, 708 N.E.2d 350 (1999), as well as directions that mere nudity without lewdness is not child pornography, and that all six factors need not be involved for a photo to be lewd. It refused to define "lewd" for the jury as "obscene, lustful, indecent, lascivious, or lecherous," even after the jury requested the dictionary definition of the term.

The Appellate Court concluded that the trial court had a duty to answer the jury's question, and that the responses of the court were correct. The court accurately stated the law and provided the jury with well-established factors to enable it to determine whether the images were lewd. The **Lamborn** factors were readily understandable and sufficiently explained the relevant law.

The court did not abuse its discretion in refusing to provide the dictionary definition of "lewd." The dictionary definition could potentially mislead the jury or engender further confusion because it provided little concrete guidance and would most likely cause the jury to request still more help from the dictionary.

(Defendant was represented by Assistant Defender Jacqueline Bullard, Springfield.)

People v. Peoples, 2015 IL App (1st) 121717 (No. 1-12-1717, 6/30/15)

1. The State charged defendant with first degree murder and a firearm enhancement alleging that he personally discharged a firearm that proximately caused death. Six witnesses testified at trial that the fatal shots were fired from a white van. Three of those witnesses identified defendant as being one of the men in the van and of those three, two testified that defendant fired a gun. The State charged defendant as the principal and argued that he personally fired the fatal shots. The State never argued or pursued a theory at trial that defendant was accountable for the shooting and did not request accountability instructions.

During deliberations, the jury sent a note asking whether someone can be guilty of murder and "not pull the trigger." The note further stated that "we are struggling with the concept of a guilty verdict but not having enough evidence that shows or proves [defendant] was the shooter." Over defendant's objection, the court answered the jury's question: "Dear Jury, the answer is Yes." Five minutes later the jury found defendant guilty of first degree murder, but acquitted him of the firearm enhancement.

2. The Appellate Court held that the trial court's response to the jury's question was incorrect. Under the facts of this case, where the State never pursued a theory of accountability at trial, it was improper to instruct the jury that it could convict on a theory of accountability. The Court also found that the error was not harmless beyond a reasonable doubt. There was a serious risk that defendant was convicted on a theory never presented to the jury and which defendant never had a chance to contest.

3. The Court, however, did not find that the error required an outright reversal of defendant's conviction. Although the guilty verdict on first degree murder conflicted with the acquittal of the firearm enhancement, legally inconsistent verdicts do not mandate outright reversal of a conviction. And even though the facts of this case strongly suggested that the jury did not believe defendant was the "principal shooter," such a conclusion would still be speculation, and a reviewing court "may not guess as to why a jury did what it did, no matter how obvious it may seem."

The Court remanded the case for a new trial.

(Defendant was represented by former Assistant Defenders Patrick Morales-Doyle and Rachel Moran, Chicago.)

Top

§32-6(b)
Jury Considering Matters not in Evidence

People v. Holmes, 69 Ill.2d 507, 372 N.E.2d 656 (1978) At trial, there was testimony that the heel of defendant's shoe matched that of the assailant. A juror visited a shoe store and inspected various heels. The Court held that the improper information brought to the jury's attention was crucial to the question of identification, and was reversible error because defendant was not confronted with it at trial and had no opportunity to refute it.

People v. Taylor, 166 Ill.2d 414, 655 N.E.2d 901 (1995) No reversible error occurred where the jury was erroneously allowed to see a judicial opinion that had not been admitted to evidence.

People v. Hanson, 83 Ill.App.3d 1108, 404 N.E.2d 801 (2d Dist. 1980) At defendant's trial for armed robbery, defendant's coat was introduced and taken to the jury room during deliberations. The jury found currency in a pocket of the coat, and the currency bore evidence of cutting. Since the currency had not been introduced into evidence, it could not be considered by the jury. The Appellate Court reversed because the jury could have inferred that the cutting took place during the struggle with the victim, destroying defendant's claim that he did not participate in the offense.

People v. Carr, 53 Ill.App.3d 492, 368 N.E.2d 128 (2d Dist. 1977) Certain written statements of State witnesses, which contained both prior consistent and prior inconsistent statements of the witnesses were taken to the jury room during deliberations. The prior consistent statements allowed the testimony of the State witnesses to be improperly bolstered and re-emphasized. In addition, prior inconsistent statements generally cannot be taken to the jury room; here, allowing the statements in the jury room was even more improper since the written statements contained additional material which was not admissible, and the jury was not sufficiently instructed as to the limited purpose of the impeaching statements. Reversed and remanded.

Cumulative Digest Case Summaries **§32-6(b)**

People v. Averett & Tucker, 237 Ill.2d 1, 927 N.E.2d 1191 (2010)

1. Generally, the trial judge must answer jury questions which ask explicit questions or request clarification about points of law arising from facts showing doubt or confusion. However, the judge may exercise discretion and decline to answer jury questions where the instructions are readily understandable and explain the relevant law, where further instructions would be misleading, where the jury's request involves a question of fact, or where the answer would express an opinion that would likely direct a verdict for one side or the other.

Where the jury asked the trial court to "[c]larify the charges of intent to sell" in a possession of controlled substances case, and the instructions previously given were explicit and readily understandable, the trial court did not err by directing the jury to review the evidence and instructions and continue to deliberate.

In addition, defense counsel acquiesced in the trial court's answer by assisting the trial court in devising an answer to the question and agreeing to that answer. Thus, defendant waived any right to challenge the answer on appeal.

2. See also, **WITNESSES**, §57-6(b)(4)(f)(1).

(Defendant Averett was represented by former Assistant Defender Debra Loevy-Reyes, Chicago.)

(Defendant Tucker was represented by Assistant Defender Steven Becker, Chicago.)

Top

§32-6(c)
Communication with Jury

Parker v. Gladden, 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966) Bailiff's remarks to jury (that "defendant was guilty and that if there was anything wrong the Supreme Court would correct it") violated defendant's right to trial by impartial jury. "The conduct of the bailiff involves such a probability that prejudice will result that the trial is deemed inherently lacking in due process."

Turner v. Louisiana, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1964) It was a violation of due process for the jury to be in the custody of two deputy sheriffs who were also principal prosecution witnesses. "The relationship was one which could not but foster the jurors' confidence in those who were their official guardians during the entire period of the trial."

U.S. v. Gagnon, 470 U.S. 522, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985) During trial, a juror became concerned because defendant was sketching portraits of the jury. The judge ordered that the sketching stop but defense counsel suggested that the judge question the juror about possible prejudice. The judge stated that the juror would be questioned in chambers and defendant did not object or ask to be present. The judge then questioned the juror in the presence of defendant's counsel. The Court held that defendant did not have a due process right to be present at the *in camera* discussion on such a minor matter.

Rushen v. Spain, 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1984) A contention that *ex parte* communications between a trial judge and a juror can never be harmless error was rejected.

People v. Canaday, 49 Ill.2d 416, 275 N.E.2d 356 (1971) Before a jury verdict will be set aside because of an unauthorized communication with the jury, the defendant must show prejudice. Here, the judge's communication with the jury outside court concerned only when the jury was to appear for trial. See also, **People v. Williams**, 38 Ill.2d 115, 230 N.E.2d 224 (1967) (jurors talked with families by telephone, but did not discuss trial); **People v. Georgev**, 38 Ill.2d 165, 230 N.E.2d 851 (1967) (prejudice would not be presumed

where jury mingled with spectators and witnesses before being sworn).

People v. Childs, 159 Ill.2d 217, 636 N.E.2d 534 (1994) Because an *ex parte* communication between the judge and jury violates a defendant's constitutional rights to appear and to participate in all proceedings, the trial court should have contacted defense counsel before deciding not to respond to the jury's questions. See also, **People v. Oden**, 261 Ill.App.3d 41, 633 N.E.2d 1385 (5th Dist. 1994) (the trial court erred by failing to give supplemental instructions in response to explicit questions about a concept that was not involved in the case, and by failing to notify defense counsel of the question.)

People v. McDonald, 168 Ill.2d 420, 660 N.E.2d 832 (1995) Where defendant represented himself at the death penalty hearing, the trial court erred by responding to the jury's questions during deliberations without informing defendant that a communication had been received. However, defendant suffered no prejudice from the *ex parte* communication where standby counsel was present and the trial judge declined to answer the jury's questions.

People v. Kawoleski, 313 Ill. 257, 145 N.E.2d 203 (1924) Defendant was entitled to a new trial where sheriff, who was in charge of jury, said that "it should not take more than two or three minutes to convict that bird." This remark was made during trial and within the hearing of the jury.

People v. Ross, 303 Ill.App.3d 966, 709 N.E.2d 621 (1st Dist. 1999) Reversible error occurred where, in defense counsel's absence, the trial court interrupted deliberations at 10:30 p.m. to ask whether the jury would be able to reach a verdict that night. A criminal defendant is entitled to appear "in person and by counsel" at all proceedings that involve substantial rights, including jury deliberations. The court rejected the State's argument that because defendant was personally present, no error occurred. "A defendant has the right not only to be present in person, but also to be present *by counsel* at all critical stages of the proceedings . . . including . . . communications between the court and jury during deliberations." The State was unable to demonstrate that the improper communication was harmless error. First, the trial judge acted on his own initiative and was not responding to any action by the jury. Second, after learning that the foreman believed that a verdict could be reached that evening, the judge ordered further deliberations but said he would "call [the jury] out shortly." In light of the fact that a verdict was returned only 16 minutes later, the jury likely interpreted the judge's remarks as an admonition to have a verdict ready when it was called back.

Cumulative Digest Case Summaries **§32-6(c)**

People v. Leach, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-09-0339, 5/31/11)

1. Although jury instructions are to be settled before closing arguments, the jury may be entitled to further instructions if it poses a question during deliberations. Generally, the trial court has a duty to provide further instruction where the jury poses an explicit question or requests clarification on a point of law arising from facts about which there is doubt or confusion. However, the trial court may refuse to answer a jury question where the instructions are readily understandable and sufficiently explain the relevant law, where further instructions would serve no useful purpose or might mislead the jury, where the jury's inquiry involves a question of fact, or where the giving of an answer would cause the court to express an opinion that would likely direct a verdict one way or the other. In addition, the court should not submit new charges or theories to the jury after deliberations have started.

2. Defendant was charged with aggravated discharge of a firearm for discharging a firearm in the direction of "Anthony White." The evidence showed that defendant discharged the firearm toward a group of several persons.

The instructions indicated that to convict, the jury was required to find that defendant discharged the

firearm in the direction of White. During deliberations, the jury asked whether the aggravated discharge charge applied only to White. The trial court responded by giving a new instruction that replaced the phrase "Anthony White" with the phrase "another person."

The Appellate Court concluded that the trial judge did not err by responding to the inquiry. The jury's request was explicit and concerned a specific charge relating to a specific fact. Furthermore, the inquiry concerned a question of law and indicated that the jury was confused about whether the charge applied to anyone other than White. Under these circumstances, the trial court acted properly by answering the question.

Furthermore, the court did not err by giving the replacement instruction. The court noted that the essential elements of aggravated discharge of a firearm are that the defendant knowingly or intentionally discharged a weapon in the direction of another. Because the name of a specific victim is not an element of the offense, the addition of White's name to the charge was mere surplusage. Thus, by giving the revised instruction the trial court did not issue a new theory of liability or deprive the defendant of an opportunity to prepare a defense or make an effective closing argument.

Defendant's conviction for aggravated discharge of a firearm was affirmed.

(Defendant was represented by Assistant Defender Laura Weiler, Chicago.)

People v. Turman, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-09-1019, 6/30/11)

1. The term "reasonable doubt" is self-defining and needs no further elaboration. The principle that a jury is entitled to have its legal questions answered does not include a request to have reasonable doubt defined.

After deliberating several hours, the jury asked for a "more explicit, expansive definition of reasonable doubt." With the agreement of the parties, the court responded that "reasonable doubt is not defined under Illinois law. It is for the jury to collectively determine what reasonable doubt is."

By instructing the jury that it could collectively determine what reasonable doubt is, the court allowed the jury to use a standard that in all likelihood was below the threshold of the reasonable doubt standard. The best response for the court to have made would have been to refuse to give the jury an additional explanation.

The court found this instruction to be plain error under both prongs of the plain-error rule. A 17-year-old defendant was charged with criminal sexual assault of 19-year-old college student who had drunk excessive amounts of alcohol, on the theory that he knew that she was unable to give knowing consent to sexual acts. Faced with this difficult task, it was critical that the jury understand what standard of proof it was to utilize. Under the first prong, because of the closeness of the evidence, the clear error threatened to tip the scales of justice against the defendant. Under the second prong, the error was so serious that it affected the fairness of the defendant's trial and his right to due process, thereby challenging the integrity of the judicial process.

2. The court also found that the omission of language that it was for the jury to determine whether the defendant made the statement from an instruction regarding the jury's consideration of statement evidence (IPI Crim. 4th No. 3.06-3.07) was plain error. At trial, defendant denied making many of the statements contained in a written statement. He testified that the statement was never reread to him even though he signed each page of the statement, and asserted that he did not even know the definition of a word attributed to him in the statement. There was evidence supporting his denial as the grammar and language used by defendant in a note he wrote to the complainant was at odds with the language the prosecution claimed defendant used in the statement. Given the importance of the statement to the State's case and the closely-balanced nature of the evidence, the error "threatened to tip the scales of justice away from the defendant." It also satisfied the second prong of the plain-error rule as it "deprived the defendant of a fair trial and impacted the integrity of the judicial process.

This error was not cured by a separate instruction on the jury's consideration of prior inconsistent statement evidence (IPI Crim. 4th No. 3.11) that informed the jury that it was for the jury to determine if the "witness made the earlier [inconsistent] statement" because it was unclear which instruction the jury chose to follow.

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

People v. Walker, 2011 IL App (1st) 072889 (No. 1-07-2889, 9/1/11)

The trial court did not coerce a verdict where, midway through a two-day trial, it informed jurors that the trial would conclude on the next court date and that "once you start deliberating, you'll continue to work until you reach a verdict." Taken in context, it was clear that the remarks were intended to advise the jurors that they needed to make appropriate plans to deliberate, including notifying their families and bringing any medications they might need. Noting that the jurors were not deliberating or deadlocked when the remarks were made, the Appellate Court concluded that the judge "simply conveyed a schedule timeline for the remainder of the proceedings," without suggesting that the jury would be held indefinitely until a verdict was reached.

(Defendant was represented by Assistant Defender Michael Orenstein, Chicago.)

People v. Wilcox, 407 Ill.App.3d 151, 941 N.E.2d 461 (1st Dist. 2010)

1. The trial court's comments to a deadlocked jury are improper if, under the totality of the circumstances, the language interfered with the jury's deliberations and coerced a guilty verdict. Coercion is a highly subjective concept that does not lend itself to precise definition. Thus, the reviewing court is required to determine whether the challenged comments imposed such pressure on minority jurors to cause them to defer to the conclusions of the majority in order to reach a verdict.

The length of deliberations after the trial court's comments does not, in and of itself, determine whether the comments were the primary factor in returning a verdict. However, the fact that a verdict was reached shortly after improper comments were made gives rise to an inference that minority jurors were coerced.

Where the jury deliberated for almost three hours before indicating that it was deadlocked on all counts, the trial court acted improperly by replying that the jurors had taken an oath to reach a verdict and that they should "continue to deliberate and obtain a verdict." Approximately 40 minutes later, the jury returned verdicts convicting defendant of first degree murder and aggravated unlawful restraint.

The court concluded that the trial court's response was improper because it conveyed that the jurors were required by their oaths to reach a verdict, and did not leave open the option of failing to return any verdict. The court also noted that the trial court failed to give a **Prim** instruction, which has been approved by the Illinois Supreme Court and which is designed to guide a deadlocked jury while avoiding any coercion.

In the course of its opinion, the court found that the passage of approximately 40 minutes between the trial court's comments and the verdicts neither suggested nor rebutted an inference that the verdicts were coerced.

The court also found that giving the coercive response constituted plain error under both the first and second prongs of the plain error rule, because the evidence was closely balanced and because the error affected defendant's right to a fair trial.

(Defendant was represented by Assistant Defender Jonathan Steffy, Chicago.)

People v. Williams, 2013 IL App (4th) 110936 (No. 4-11-0936, 4/25/13)

1. When a jury asks an explicit question or request clarification on a point of law arising from facts over which there is doubt or confusion, the trial court has a duty to provide further instruction. A court may refrain from answering a jury question (1) when the previously-given instructions sufficiently explain the relevant law; (2) where further instruction would serve no useful purpose or would mislead the jury; (3) when the jury's question is one of fact; or (4) where the court's response would require it to express an opinion that would likely direct the verdict.

Once jury deliberations commence, the court must refrain from submitting new charges or new theories to the jury. The danger of instructing on new crimes or theories is that the jury may convict defendant

of a crime or on a theory that the defendant had no opportunity to defend against.

2. The State charged defendant with child abduction for attempting to lure a child into his vehicle for an "unlawful purpose." There was evidence that defendant attempted to sell a 14-year-old boy a pair of shoes from his car and asked the boy if he wanted a ride after he said he had no money. The boy also testified that defendant was playing pornography on a laptop that he had in the car. Defendant admitted trying to sell the shoes to the boy and playing pornography on the laptop in the car, but told the police that he "doubted" that the boy could have seen the computer screen.

While deliberating, the jury asked, "Is providing a minor access to pornographic material an unlawful act in violation of a criminal statute?" Over defense objection, the court instructed the jury that "other than a lawful purpose" meant any violation of the criminal code, and gave the jury full instructions on the offense of distributing harmful material to a minor. The State had not charged this offense or pursued it as a theory of "unlawful purpose" at trial. Its theory at trial was that the pornography, like the shoes, was merely part of the lure, rather than the reason for the lure.

3. The Appellate Court reversed defendant's conviction and remanded for a new trial. The instruction introduced a new theory not argued by the State and allowed the jury to convict defendant for distributing harmful material to a minor, a crime it did not charge. Defendant did not have an adequate opportunity to defend against this theory or charge where it did not become a crucial issue until after the jury deliberations began.

The error was not harmless because whether defendant knowingly showed pornography to the boy was a contested issue of fact. Defendant admitted trying to sell shoes to the boy and offering him a ride, but neither is a crime unless the State can prove an unlawful purpose. The court could not conclude that the jury would have convicted defendant without the instruction.

In the course of its decision, the Appellate Court noted that there is a permissive inference instruction (IPI Criminal 4th No. 8.11A) that allows the jury to infer an unlawful purpose if the defendant attempted to lure a child into a car without the consent of a parent or lawful custodian. That instruction was not given to the jury, but should be given at the new trial.

(Defendant was represented by Assistant Defender Amber Corrigan, Springfield.)

Top

§32-7
Sequestration of Jury

People v. Gacy, 103 Ill.2d 1, 468 N.E.2d 1171 (1984) Trial judge did not err by refusing to sequester the jurors between their selection and the start of trial.

People v. Dungy, 122 Ill.App.3d 314, 461 N.E.2d 485 (1st Dist. 1984) Defendant contended that the trial judge should not have allowed jurors to separate and return to their home during deliberations. The Court held that defendant waived any objection to the above procedure where defense counsel failed to object and "participated in the procedure by suggesting additional cautions for the jury." The Court also noted that the defendant "offers no evidence to establish that she was in any way prejudiced by this procedure." (**Note**: Effective July 1, 1997 Supreme Court Rule 436 specifically authorizes the trial court to permit jurors to separate overnight, on weekends or holidays, or in emergencies.)

People v. Johnson, 388 Ill.App.3d 199, 902 N.E.2d 1265 (3d Dist. 2009) A criminal defendant has a constitutional right to appear personally and by counsel at all proceedings involving his substantial rights. Thus, once the jury has begun to deliberate, the defendant has the right to be present during any communication between the jury and the trial court. If communication between the judge and jury occurs in

the defendant's absence, the State has the burden to show beyond a reasonable doubt that the defendant was not prejudiced. As a matter of plain error, the Appellate Court found that the State failed to sustain its burden of showing that the trial court's *ex parte* communication with the jury did not cause prejudice. After deliberating 30 to 40 minutes, the jury sent a note to the judge stating that it was split 11 to one and asking for advice. Without notifying the parties, the judge responded that the jury should continue to deliberate. The Appellate Court concluded that the State could not carry its burden of showing a lack of prejudice by arguing that due to the short duration of deliberations, the trial judge would have refused to give the ***Prim*** instruction even had the defense been present and requested the instruction.

People v. Saltz, 75 Ill.App.3d 477, 393 N.E.2d 1292 (2d Dist. 1979) The sequestration of a jury is within the discretion of the trial court. The trial court's refusal to sequester the jury was not an abuse of discretion in light of the admonishments given to the jurors and the limited coverage of the case.

People v. Dahlin, 184 Ill.App.3d 59, 539 N.E.2d 1293 (5th Dist. 1989) The jury began deliberating at 9:50 p.m. At 10:55 p.m., the jury was brought into court. The judge ordered a recess and sent the deliberating jurors home for the night with instructions to return the following morning. The judge admonished the jurors not to discuss the case with anyone, including their families. The defendant contended it was reversible error to allow the jurors to return home during their deliberations. The Appellate Court adopted the reasoning of **People v. Jackson**, 105 Ill.App.3d 750, 433 N.E.2d 1385 (4th Dist. 1982),which held that issues regarding jury separation may be waived.

Cumulative Digest Case Summaries **§32-7**

People v. McCoy, 405 Ill.App.3d 269, 939 N.E.2d 950 (1st Dist. 2010)

The Appellate Court rejected the argument that the trial judge coerced a verdict by informing the jury it would be sequestered, but allowing deliberations to continue when several jurors said they were close to a verdict and would like more time. Whether the trial court's remarks coerced a verdict is reviewed for an abuse of discretion. The test is whether under the totality of the circumstances, the language used by the court actually interfered with the deliberations or coerced a verdict.

Simply informing a jury that it will be sequestered is not necessarily coercive. Similarly, although extremely brief deliberations after a reference to sequestration may invite an inference that the verdict was coerced, the time between a mention of sequestration and a verdict is not generally a conclusive indication that the jury was coerced.

The court concluded that because a number of the jurors volunteered that they were close to reaching a verdict and requested additional time, and no juror interjected to claim that the jury was deadlocked or was having difficulty, the judge's remarks did not coerce a verdict. Furthermore, the jury had deliberated for several hours, had requested and reviewed the trial testimony of certain witnesses, and determined that defendant was not guilty of one charge.

Defendant's conviction for attempt first degree murder and aggravated battery with a firearm was affirmed.

(Defendant was represented by Assistant Defender Michael Orenstein, Chicago.)

Top

§32-8
Instructions to Jury

§32-8(a)
General Rules

U.S. v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995) Where a defendant elects a jury trial, the rights to due process and a jury trial require that the jury determine *every* element of the offense beyond a reasonable doubt. Thus, where defendant was charged with making material false statements in a matter within the jurisdiction of a federal agency, the trial court erred by instructing the jury that it was to assume that the defendant's statements were "material."

Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) Where the State argues defendant's "future dangerousness" as a reason for imposing a death sentence, the amount of time defendant will serve under a non-death sentence is a relevant sentencing consideration. Thus, due process required that the jury be instructed that if defendant was not sentenced to death, he would be sentenced to life imprisonment and would be statutorily ineligible for parole.

People v. Carter, 208 Ill.2d 309, 802 N.E.2d 1185 (2003) Under **People v. Brocksmith**, 162 Ill.2d 224, 642 N.E.2d 1230 (1994), the defendant has the right to decide whether to tender an instruction on a lesser included offense. Where the parties fail to tender a lesser included offense instruction, or where defense counsel requests such an instruction but defendant objects, the trial court has discretion to give the instruction if the evidence will support both the charged crime and the lesser included offense. In determining whether to give a lesser included offense instruction *sua sponte*, the trial court should consider the views of the prosecution and the defense, along with society's interest "in avoiding unjustified exoneration of wrongdoers and in punishing an accused only to the extent of the crime." No one consideration controls; the trial court must balance the factors and determine whether to exercise its discretion. Here, the trial court did not abuse its discretion by refusing to give an involuntary manslaughter instruction where defendant objected to defense counsel's request and asked that the jury be instructed only on first degree murder.

People v. Green, 225 Ill.2d 612, 870 N.E.2d 394 (2007) Where the jury was properly instructed concerning the elements of the offense of robbery of a person aged 60 or older, a verdict form finding defendant guilty of robbery was adequate to convict of robbery of a person over the age of 60. The court rejected the argument that the verdict form was insufficient to convict of a Class 1 felony because it omitted any reference to the victim's age.

People v. Hudson, 222 Ill.2d 392, 856 N.E.2d 1078 (2006)The Supreme Court held that the trial court properly used a non-IPI instruction concerning felony murder, but suggested a more clear instruction to be used in cases in which the death is caused by the intended victim of a forcible felony.

People v. Herron, 215 Ill.2d 167, 830 N.E.2d 467 (2005) At the time of defendant's trial, IPI Crim. 4th No. 3.15 instructed the jury that in evaluating identification testimony it should consider "all the facts and circumstances." In addition, IPI No. 3.15 listed five specific factors to be considered, with the notation "[or]" between each paragraph. The Committee Note to IPI No. 3.15 indicated that the bracketed numbers were intended to guide court and counsel, and should not be included in the instructions submitted to the jury. Adopting the reasoning of **People v. Gonzalez**, 226 Ill.App.3d 629, 761 N.E.2d 198 (1st Dist. 2001), the court held that including "[or]" between the factors in the instruction given to jurors erroneously implies that identification testimony may be deemed reliable if just one of the five listed factors is present. A jury instruction issue rises to plain error where it creates a serious risk that the defendant was incorrectly convicted because the jury did not understand the applicable law. Where only one eyewitness identified defendant, but that witness's physical description of the robber conflicted with the description of another witness, inclusion of the term "or" created a serious risk of an erroneous conviction. See also, **People v. Durr**, 215 Ill.2d 283,

830 N.E.2d 527 (2005)(erroneous jury instruction constitutes plain error only where it creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law.)

People v. Hopp, 209 Ill.2d 1, 805 N.E.2d 1190 (2004) When instructing a jury on conspiracy, the trial court is required to give an instruction defining the offense that is the subject of the conspiracy. The failure to give such an instruction constitutes plain error, however, only if there is a serious risk "that the jurors incorrectly convicted the defendant because they did not understand the applicable law."Conspiracy to commit murder requires that the conspirator intended to kill. Thus, in a prosecution for conspiracy to commit murder, a proper definition of "murder" would inform the jury that the State was required to prove intent to kill. Here, there was no serious risk that the jury misunderstood the law. The court distinguished the failure to define the offense at all from the situation in which an erroneous instruction is given and rejected the argument that the jury might have believed that the State failed to prove intent to kill, finding that the evidence of defendant's intent was overwhelming. The court also noted the jury was instructed to convict of conspiracy to commit murder only if defendant intended that first degree murder be committed, and therefore "would undoubtedly understand" that the State had to prove intent to kill.

People v. Medina, 221 Ill.2d 394, 851 N.E.2d 1220 (2006) Under Illinois law, five decisions ultimately belong to the defendant after consultation with defense counsel: (1) what plea to enter; (2) whether to waive a jury trial; (3) whether to testify; (4) whether to appeal; and (5) whether to submit an instruction on a lesser included offense. The court discussed the circumstances in which the trial court should personally admonish the defendant concerning his right to decide whether to submit a lesser included offense instruction and noted that in this case, defendant would not have been entitled to a lesser included offense instruction had he requested one. A lesser included instruction is appropriate where the evidence is such that the jury could rationally find the defendant guilty of the lesser offense while acquitting of the greater offense. Where the evidence clearly showed that the defendant was guilty of possession of controlled substances with intent to deliver, and no basis on which he could have been acquitted of that offense and convicted of simple possession of a controlled substance, a lesser included offense instruction would have been improper.

People v. Mohr, 228 Ill.2d 53, 885 N.E.2d 1019 (2008) Instructions are proper at a criminal trial if there is some evidence in the record to justify them. Instructions which are not supported by either the evidence or the law should not be given. On review, the question is whether the instructions, considered as a whole, fully and fairly announce the law applicable to the theories of the parties. Error exists if the jury instructions are not sufficiently clear to avoid misleading the jury. The court concluded that the trial judge abused his discretion by giving an instruction defining "provocation" where the State had conceded that provocation existed, and there was no issue to be decided.

People v. Parker, 223 Ill.2d 494, 861 N.E.2d 936 (2006) Where the defendant is charged with first degree murder and the jury is also instructed on second degree murder, no error occurs where the jury receives a specific "not guilty of first degree murder" verdict form, but does not receive a general "not guilty" verdict form. Where a jury is instructed only on first and second degree murder, IPI Crim. 4th, No. 26.02 states that the jury should be given a general "not guilty" verdict form. Where the jury is also instructed on additional charges, a specific "not guilty of first degree murder" verdict form is required to avoid confusion with the verdict forms for the additional offenses. Despite IPI No. 26.02, the court concluded that where only first and second degree murder instructions are given, it is not error to give only a specific "not guilty of first degree murder" verdict form. Because second degree murder is a lesser mitigated offense of first degree murder, and the jury was told that it could consider second degree murder only if it found the defendant guilty of first degree murder, signing the specific "not guilty" form for first degree murder "would unambiguously establish the jury's intention to acquit on all charges."

People v. Piatkowski, 225 Ill.2d 551, 870 N.E.2d 403 (2007) IPI Crim. 4th No. 3.15 lists five factors to be considered by the jury in weighing identification testimony, with the notation "[or]" between each paragraph. In **People v. Herron**, the Supreme Court held that it is "clear and obvious error" to give IPI Crim. 4th No. 3.15 with the term "or" included, because the jury is instructed both to consider all of the factors and that it may choose to consider only a single factor. Whether the inclusion of the word "or" constitutes plain error depends on the circumstances of the case. Here, the testimony of two eyewitnesses linked defendant to the crime - there was no physical evidence, and defendant made no inculpatory statements. Because the evidence on the five factors described by IPI Crim. No. 3.15 was not overwhelmingly in favor of the State, and because the instruction concerned how to evaluate a critical component of the case, plain error occurred.

People v. Pollock, 202 Ill.2d 189, 780 N.E.2d 669 (2002) The trial court erred by giving a non-pattern jury instruction which misstated the law of accountability. The trial court may elect to give a non-pattern instruction where pattern instructions do not accurately reflect the law, but abuses its discretion by giving a non-pattern instruction that is not accurate, simple, brief, impartial and non-argumentative. An inaccurate accountability instruction was not harmless error merely because the trial court also gave the IPI instruction on accountability. Where the jury receives conflicting instructions, only one which is an accurate statement of the law, the error is prejudicial because the jury has not been properly instructed on the applicable law.

People v. Bolden, 197 Ill.2d 166, 756 N.E.2d 812 (2001) The trial court did not err by giving a non-IPI instruction that a person is not entitled to have counsel at a lineup conducted before the commencement of adversarial proceedings. The trial court has discretion to instruct the jury on particular matters and whether to use non-IPI instructions. Because defendant attacked the reliability of the identification procedure and repeatedly argued that defense counsel had been excluded from the room where the identification was made, the trial judge properly gave the jury accurate information concerning the relevant law.

People v. Casillas, 195 Ill.2d 461, 749 N.E.2d 864 (2000) The trial judge's failure to instruct the jury that the indictment is not evidence of guilt does not raise a constitutional issue. Thus, defense counsel's failure to tender a proper instruction and object to its omission waived the issue.

People v. Simms, 192 Ill.2d 348, 736 N.E.2d 1092 (2000) Because aggravated criminal sexual assault is a general intent crime, jury instructions need not include a specific mental state.

People v. Williams, 181 Ill.2d 297, 692 N.E.2d 1109 (1998) Although the jury did not initially have the benefit of written instructions while they were being retyped, defendant was not precluded from effectively presenting his second degree murder and self-defense claims. The court noted that the oral instructions were proper, the evidence against the defendant was overwhelming, and the jury deliberated for more than an hour after receiving the written instructions.

People v. Ramey, 151 Ill.2d 498, 603 N.E.2d 519 (1992) Death penalty defendant was entitled to have the jury decide whether his mental state at the time of the offense rendered him eligible for a death sentence. Thus, where the jury instructions failed to include a mental state element that is an element of the offense, the defendant is entitled to resentencing.

People v. Ogunsola, 87 Ill.2d 216, 429 N.E.2d 861 (1981) The failure to correctly instruct the jury on the elements of the crime is error so grave and fundamental that it can not be waived. See also, **People v. Stromblad**, 74 Ill.2d 35, 383 N.E.2d 969 (1978).

People v. Wilkerson, 87 Ill.2d 151, 429 N.E.2d 526 (1981) The Court held that the jury instructions, were "so confusing that the jury's verdict is suspect and cannot stand." The instructions did not distinguish

between the two defendants (one defendant raised an alibi defense and the other raised self-defense), and the issues instruction for the principal offense did not include self-defense, which was set forth in an accompanying instruction.

People v. Fryman, 4 Ill.2d 224, 122 N.E.2d 573 (1954) A defendant is entitled to have the jury instructed to the law applicable to the facts testified to, but also that applicable to any state of facts which the jury might legitimately find from the evidence to have been proved. In addition, the defendant is entitled to the benefit of any defense shown by the entire evidence. See also, **People v. Jones**, 175 Ill.2d 126, 676 N.E.2d 646 (1997) (in attempt aggravated criminal sexual abuse case, State's evidence raised defense of reasonable belief that 16-year-old complainant was 17).

People v. Kolep, 29 Ill.2d 116, 193 N.E.2d 753 (1963) No single instruction is required to state all of the relevant law on a given subject. It is sufficient if the series of instructions, considered as a whole, fully and fairly announce the applicable law. See also, **People v. Mills**, 40 Ill.2d 4, 237 N.E.2d 697 (1968); **People v. Harris**, 33 Ill.App.3d 600, 338 N.E.2d 129 (3d Dist. 1975).

People v. Williams, 161 Ill.2d 1, 641 N.E.2d 296 (1994) The indictment alleged that the defendant shot and killed the decedent. Because the State pursued the theory that defendant was the principal, the trial court erred by giving an accountability instruction on murder. However, the Court also concluded that the improper accountability instruction was harmless because, in view of the evidence and arguments in the lower court, the jury could only have concluded that defendant was guilty as a principal or not guilty at all. See also, **People v. Jamison**, 207 Ill.App.3d 565, 566 N.E.2d 58 (3d Dist. 1991) (error to respond to jury's questions with instructions on accountability where theory at trial was that defendant was principal; error was not harmless where the evidence left doubt of defendant's guilt as principal).

People v. Bush, 157 Ill.2d 248, 623 N.E.2d 1361 (1993) The Court held that the trial court erred by giving a non-IPI instruction that could have confused the jury about the elements of home invasion. Although non-IPI instructions may be given where the pattern instructions do not reflect the law, such instructions must be accurate, simple, brief, impartial and non-argumentative. The non-IPI instruction in this case misstated the limited-authority doctrine in that it said that consent for an entry was vitiated merely because criminal acts were subsequently committed, without regard to whether those crimes were intended at the time of the entry. In appropriate cases the jury should be instructed that a consensual entry to a dwelling is unauthorized where the defendant, or one for whose conduct he is accountable, at the time of the entry intends to commit criminal acts once inside the dwelling.

People v. Brocksmith, 162 Ill.2d 224, 642 N.E.2d 1230 (1994) Defendant, rather than defense counsel, has the right to decide whether to request a lesser included offense instruction.

People v. Cook, 262 Ill.App.3d 1005, 640 N.E.2d 274 (1st Dist. 1994) Defendant was convicted, in a jury trial, of the second degree murder of his girlfriend. Expert testimony presented by the State showed that the girlfriend suffered an extreme beating and was strangled. Defendant testified that he had seen the deceased become violent on prior occasions, that she had told him approximately a week earlier that she had stabbed her ex-husband when she learned that he had been seeing his ex-wife, and that on the day of the offense the deceased had seen him talking to another woman and had warned him not to "sleep too tight." Finally, the defendant testified that he struck the decedent in self-defense when she attempted to stab him with a boxcutter. The jury was not instructed that the prosecution has the burden of proving beyond a reasonable doubt that the defendant was not justified in using the force employed. Although defense counsel failed to tender the instruction, the Court concluded that the failure to instruct on the State's burden of proof was plain error because the evidence was close and the outcome of the trial might have been different had the instruction been

given.

People v. Cadwallader, 181 Ill.App.3d 488, 536 N.E.2d 1319 (4th Dist. 1989) In reading the instructions to the jury the trial judge noticed that one of the issue instructions, as typed, failed to include the required final paragraph. Since the typed instruction was defective, the judge sent the jury to deliberate without the written instructions. Shortly thereafter it was discovered that a necessary paragraph was also missing from another instruction. After about 35 minutes of deliberations, the jury was returned to the courtroom and read the corrected instructions. The Appellate Court held that it was "plain error for the jury to have been deprived, for any amount time, of the essential instructions that would have explained the elements of the crimes charged, the presumption of innocence, and the burden of proof." For about half its deliberations the jury was "without jury instructions to guide them"; thus, "was erroneously left to its own speculation and improvisation."

People v. Sanders, 129 Ill.App.3d 552, 472 N.E.2d 1156 (1st Dist. 1984) In orally giving the issues instruction for attempt murder, the trial judge stated that "if any one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty." (The IPI instruction for the offenses states that the defendant should be found guilty only if all of the propositions have been proven beyond a reasonable doubt.) The Court held that the instruction was "plain error" since it authorized the jury to convict defendant if less than all the elements were proven.

People v. Cardamone, 381 Ill.App.3d 462, 885 N.E.2d 1159 (2d Dist. 2008) In view of the extensive other crimes evidence submitted, the trial court erred by refusing defendant's request to instruct the jury that it was required to unanimously find defendant's guilt as to each crime charged. The instructions specifying the charges did not provide dates of the alleged conduct or describe the allegations clearly enough that the jury would necessarily base the verdicts on the same acts. "[W]here the majority of the State's case involved uncharged offenses that allegedly occurred in the same time frame as the charged offenses, a separate instruction that the jury had to be unanimous regarding the *charges* was warranted."

People v. Carmona-Olvara, 363 Ill.App.3d 162, 842 N.E.2d 313 (1st Dist. 2005) A jury instruction regarding inconsistent statements is appropriately given when two statements are inconsistent on a material matter. An issue is material if the contradiction reasonably tends to discredit the testimony of a witness. The materiality of a prior inconsistent statement is to be determined by the trial court. The court found that the trial court erred when it refused to determine whether an inconsistency in the testimony of the arresting officer was material, and also when it refused an instruction on inconsistent statements, because defense counsel did not have a copy of the instruction prepared and the judge refused to delay the proceedings for five minutes.

People v. Chatman, 381 Ill.App.3d 890, 886 N.E.2d 1265 (2d Dist. 2008) As a matter of plain error, the trial judge erred at a trial for domestic battery and aggravated domestic battery by: (1) instructing the jury on self-defense by an initial aggressor, (2) giving only a partial explanation of self-defense, and (3) failing to instruct on the State's burden concerning self-defense.

People v. Delgado, 376 Ill.App.3d 307, 876 N.E.2d 189 (1st Dist. 2007) The Court found that the failure to instruct the jury with a definition of a critical element of the offense constituted plain error. Substantial defects in criminal jury instructions are not waived where the evidence is close or the error so serious that it affects the fairness of the trial and the integrity of the judicial process. In a criminal case the trial court must fully instruct the jury on the elements of the offense, the burden of proof and the presumption of innocence. Whether jury instructions are misleading or confusing is determined not by "whether defense counsel can imagine a problematic meaning, but whether ordinary persons acting as jurors would fail to understand them." Where the defendant was charged with aggravated criminal sexual abuse based upon the transmission of semen to the complainant's stomach, it was "clear and obvious" error to fail to properly define "sexual

conduct" as applied to the case. The failure to define a commonly understood word is not reversible error. However, the term "sexual conduct" is not self-defining as used in Illinois criminal prosecutions, because it is limited to a more narrow meaning than would be assumed by a layman. Here, the evidence was closely balanced and the complainant had a motive to fabricate because she was in trouble with her mother for leaving the house. Under these circumstances, the instructional error "threatened to tip the scales of justice."

People v. Diggins, 379 Ill.App.3d 994, 888 N.E.2d 129 (3d Dist. 2008) 720 ILCS 5/24-1.6 provides that the holder of a valid FOID card does not commit unlawful use of a weapon by possessing a weapon that is "unloaded and enclosed in a case, firearm carrying box, shipping box, or other container." The court concluded that for purposes of §5/24-1.6, the term "case" should be defined as a container which completely encloses the weapon. Because the locked center console of a vehicle clearly qualifies, the trial court abused its discretion by instructing the jury that a console could not be a "case," by refusing to instruct the jury on the container exception, and by prohibiting defendant from arguing that the console qualified for the statutory exception for encased weapons.

People v. O'Quinn, 339 Ill.App.3d 347, 791 N.E.2d 1066 (5th Dist. 2003) Use of a special interrogatory concerning the existence of an extended-term eligibility factor was not error.

People v. Robinson, 374 Ill.App.3d 949, 872 N.E.2d 73 (1st Dist. 2007) Citing **People v. Green**, 225 Ill.2d 612, 870 N.E.2d 394 (2007), the court concluded that involuntary manslaughter and involuntary manslaughter of a household member are not separate offenses. Instead, involuntary manslaughter of a household member is an elevated sentencing provision for involuntary manslaughter. Thus, a defendant could be convicted of involuntary manslaughter and sentenced for involuntary manslaughter of a household member even where the charge did not refer to the victim's status as a household member. The court also held that where a defendant who is charged with murder requests instructions on involuntary manslaughter, 725 ILCS 5/111-3(c)-5 does not require the State to provide notice of the possibility of sentencing for involuntary manslaughter of a household member. Section 111-3(c)-5 provides that a factor which increases the authorized sentence for a crime must be provided to the defendant through written notification, either in the charge or otherwise. The court concluded that §111-3(a)-5 applies only to the charged crime, not to lesser included offenses on which the defendant requests instructions.

People v. Smith, 372 Ill.App.3d 762, 866 N.E.2d 1192 (1st Dist. 2007) When a defendant is charged with intentional or knowing murder and felony murder and requests a separate verdict form for felony murder, and that request has a basis in the evidence, a separate verdict form must be given. Otherwise, consecutive sentences cannot be imposed based on the offense which is the predicate for felony murder. Affirmed, **People v. Smith**, 233 Ill.2d 1, 906 N.E.2d 529 (2009).

People v. Uptain, 352 Ill.App.3d 643, 816 N.E.2d 797 (4th Dist. 2004) A defendant is entitled to an instruction on his theory of the case if there is "some foundation" for the instruction in the evidence. Very slight evidence on the theory of defense will justify giving an instruction. In a trial for aggravated criminal sexual abuse, a defendant who produces some evidence that he reasonably believed the complainant to be at least 17 is entitled to an instruction on that affirmative defense. Where defendant presented evidence that the 16-year-old complainant engaged in playful and flirtatious behavior on the night in question, there was sufficient evidence to require the trial court to instruct the jury on the affirmative defense of a reasonable belief that the complainant was at least 17.

People v. Crite, 261 Ill.App.3d 1041, 634 N.E.2d 487 (2d Dist. 1994) At his jury trial for first degree murder, aggravated battery with a firearm and unlawful possession of a firearm by a felon, the defendant submitted instructions on several lesser included offenses, including aggravated discharge of a firearm. The jury

returned verdicts convicting defendant of the latter offense, second degree murder and unlawful use of a weapon by a felon. The jury was not provided verdict forms for aggravated battery with a firearm, one of the offenses in the original indictment. At the sentencing hearing, the State moved to "correct" the verdict form for aggravated *discharge* of a firearm by entering a conviction for aggravated *battery* with a firearm. The State argued that the jury had based its verdict on the instructions for aggravated battery with a firearm and that the correction was akin to a "typographical error." The trial court granted the motion over a defense objection. The trial judge erred by amending the verdict form to reflect a conviction for an offense other than the one selected by the jury. The Court rejected the State's argument that the trial judge was merely correcting a "typographical error." Aggravated discharge of a firearm, the offense on which the verdict form was returned, is a Class 1 felony, while aggravated battery with a firearm is a Class X felony. The Court concluded that the distinction between offenses with different sentences is more than "an error in mechanics."

People v. Robinson, 319 Ill.App.3d 459, 748 N.E.2d 624 (2d Dist. 2001) Under 720 ILCS 5/24-1(a)(7)(iii), unlawful use of a weapon is committed by possession of a bomb only where the bomb contains "an explosive substance of over one-quarter ounce." The court reached this conclusion despite IPI Criminal 4th, No. 18.01, which implies that the requirement of more than ¼ ounce of explosive material does not apply to a "bomb".

People v. Hurtado-Rodriguez, 326 Ill.App.3d 76, 759 N.E.2d 1024 (2d Dist. 2001) The trial court committed reversible error where it erroneously gave IPI 3d instructions (rather than IPI 4th) which did not accurately reflect the law in effect at the time of the offense. Because the instructions misstated an element of the offense and a properly instructed jury might have acquitted, the court reached the issue as plain error despite defendant's failure to raise it at trial or on appeal.

People v. Gonzalez, 326 Ill.App.3d 629, 761 N.E.2d 198 (1st Dist. 2001) Under the case law cited by the IPI committee in support of IPI No. 3.15 (Circumstances of Identification) all five factors listed in the instruction must be considered in determining whether an identification is reliable. Because the IPI committee placed "[or]" in brackets to inform persons who prepare jury instructions that only factors supported by the evidence in a particular case should be included, the trial court erred by including the word "or" in the instruction given to the jury. The instruction likely misled the jury into believing that the existence of a single factor could render an eyewitness identification reliable, in violation of Illinois law requiring that all five factors be considered. The plain error rule applied because the evidence was close and the jury was likely confused by the instruction. In addition, the jury sent two notes to the judge, one of which indicated that it could not reach a verdict, and found defendant guilty only after being told to continue deliberating.

People v. Dunlap, 315 Ill.App.3d 1017, 734 N.E.2d 973 (1st Dist. 2000) Although instruction of the jury generally rests within the sound discretion of the trial court, whether the defendant introduced sufficient evidence to obtain an instruction on an affirmative defense or his theory of the case presents a question of law which is reviewed *de novo*.

People v. Luckett, 339 Ill.App.3d 93, 790 N.E.2d 865 (1st Dist. 2003) Whenever the evidence justifies a self-defense instruction in a first degree murder case, the reasonableness of defendant's subjective belief in the need for self-defense is also placed in issue. Thus, a second degree murder instruction should be given. A second degree instruction was not precluded because the State proceeded only on a felony murder theory. Although a second degree murder conviction may not be based on felony murder, where the evidence is conflicting and would support findings that the defendant committed intentional murder, felony murder or second degree murder, the jury should be instructed on all three theories so it can resolve the conflict. "[W]hether the court should instruct on the offense of second degree murder is to be determined by the evidence, not by the prosecution's choice to proceed against the defendant on a theory of felony murder." See also **People v. Pinkney**, 322 Ill.App.3d 707, 750 N.E.2d 673 (1st Dist. 2000) (a defendant is entitled to an

instruction on his theory of the case if there is at least "slight" evidence to support that theory; "[w]hen the evidence supports submitting an instruction on justifiable use or force, a tendered instruction on second degree murder based on the unreasonable use of force should also be given"); **People v. Toney**, 337 Ill.App.3d 122, 785 N.E.2d 138 (1st Dist. 2003) (where evidence was conflicting and the jury was instructed on felony murder and self-defense, the trial court abused its discretion by refusing to instruct on first and second degree murder); **People v. Edmondson**, 328 Ill.App.3d 661, 767 N.E.2d 445 (1st Dist. 2002) (second degree murder instruction should be given where the evidence requires instruction on self-defense).

People v. Smith, 296 Ill.App.3d 435, 694 N.E.2d 681 (4th Dist. 1998) A defendant is not entitled to have the jury instructed on the possibility of jury nullification, even where the jury asks whether it has the "option of downgrading" the charge to battery if the elements of aggravated battery have been proven. Although "[t]he power of jury nullification exists, . . . it is not authorized by the law. A defendant has no right to have the jury defy the law or ignore the undisputed evidence."

People v. Jackson, 331 Ill.App.3d 729, 771 N.E.2d 982 (1st Dist. 2002) At defendant's trial, the judge erred by refusing to give a non-IPI instruction defining *modus operandi*. Where IPI instructions do not properly state the law, a non-IPI instruction may be given if it is brief, simple, impartial and free from argument. A trial court abuses its discretion by declining to give a non-IPI instruction where the instructions used are unclear, misleading or inaccurate. The court noted that IPI Crim. No. 3.14, which was given, does not define the term "*modus operandi*." The court rejected the State's argument that typical jurors are familiar with the term "*modus operandi*," and found that the non-IPI instruction tendered by the defense was an accurate statement of Illinois law.

People v. Carr, 149 Ill.App.3d 918, 501 N.E.2d 241 (1st Dist. 1986) Both the State and the defendant are entitled to instructions on any theory of the case that is supported by the evidence.

People v. Danielly, 274 Ill.App.3d 358, 653 N.E.2d 866 (1st Dist. 1995) As a matter of *dicta*, the Court suggested that where the State has failed to preserve evidence, the following non-IPI instruction should be given upon the defendant's request:

> "If you find that the State has allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State's interest."

Such an instruction protects defendants from "any uncertainty that might arise from missing evidence" and is an incentive to the police to "exercise due care in their handling of evidence."

People v. Cox, 74 Ill.App.2d 342, 220 N.E.2d 7 (4th Dist. 1966) Giving a flight instruction is error in the absence of proof that defendant knew or should have known that he was a suspect.

People v. James, 255 Ill.App.3d 516, 626 N.E.2d 1337 (1st Dist. 1993) The evidence showed that four fires had been set in the apartment of the defendant's former girlfriend on a night when defendant had twice gained entry to the building without being "buzzed in." In addition, defendant had been asked to leave because he was drunk and "acting strange." The State tendered verdict forms of "guilty" and "not guilty" of aggravated arson. The trial court agreed to give a lesser included offense instruction on arson, and said that it would give verdict forms of "guilty of aggravated arson," "guilty of arson," and "not guilty of any arson related offense." In reading the instructions to the jury, however, the judge said that the three verdict forms would be "guilty of aggravated arson," "not guilty of aggravated arson," and "guilty of arson." The jury convicted defendant of aggravated arson. On appeal, defendant asserted that failing to give the jury the option of acquitting him of arson had the effect of directing a verdict on that count. The Court held that a trial court commits plain error where it neglects to give an instruction which it accepted during the instruction conference, especially where

the instruction would have given the jury the option of acquitting the defendant of an offense. The fact that correct instructions were found in the common law record does not prove that the instructions were tendered to the jury, and the State offered no other evidence to show that the report of proceedings was inaccurate. Reversible error occurs where the jury is not provided with verdict forms permitting it to acquit the defendant on all of charges.

People v. Biggerstaff, 287 Ill.App.3d 813, 679 N.E.2d 118 (5th Dist. 1997) Defendant was convicted in a jury trial of first degree murder. At the instruction conference, the trial court agreed to instruct the jury on involuntary manslaughter. However, the trial court gave the jury only three verdict forms: "not guilty of first degree murder," "guilty of first degree murder," and "guilty of voluntary manslaughter." The jury was not provided with a general "not guilty" verdict or a "not guilty" verdict for involuntary manslaughter. The failure to provide a verdict form allowing the jury to acquit of involuntary manslaughter constituted reversible error. The State noted that in view of the overwhelming evidence, defense counsel had adopted the strategy of "actively pursu[ing] a guilty verdict on the lesser-included offense of involuntary manslaughter." Thus, the State argued that the failure to give a "not guilty" verdict for involuntary manslaughter was consistent with defense counsel's strategy. The Court noted that although defense counsel may elect to concede guilt on a lesser offense to avoid conviction on more serious crimes, such a strategy does not deprive the defendant of the right to a jury verdict on the question of guilt.

People v. Lovelace, 251 Ill.App.3d 607, 622 N.E.2d 859 (2d Dist. 1993) According to police witnesses, during a melee outside a teen dance club a deputy sheriff ordered the defendant to get in his car. Defendant refused, and the deputy attempted to make an arrest. The officer and the defendant struggled, and the defendant slammed the officer to the ground, causing a broken collar bone and head injuries. Other witnesses, including the defendant, testified that he told the officer that the car was locked and he could not open it. These witnesses also testified that defendant did not slam the officer to the ground, but that the defendant and several officers were involved in a struggle which ended with defendant falling to the ground on top of the deputy. At the instruction conference, the trial judge agreed to give only the first paragraph of the IPI instruction defining "knowing" behavior. The Court held that the trial judge erred by failing to give both paragraphs of the pattern instruction. The Committee Comments to the instruction provide that the first paragraph applies where the offense is "defined in terms of prohibited conduct," and the second paragraph applies where the offense is defined "in terms of a prohibited result." When "both conduct and result are in issue," both paragraphs are required. The Court concluded that because the charges alleged that defendant acted "knowingly," both conduct and result were in issue and both paragraphs of the instruction should have been given.

People v. Pearson, 252 Ill.App.3d 1, 623 N.E.2d 895 (2d Dist. 1993) Defendant was convicted of one count of aggravated criminal sexual assault involving oral sex but acquitted of a second count alleging sexual intercourse. The complainant testified that defendant took her to his home under the guise of selling her cocaine, but instead forced her to submit to repeated sexual acts. The definition instruction for aggravated criminal sexual assault correctly informed the jury that the State was required to prove that defendant committed an act of sexual penetration by the "use of force or threat of force." In addition, a separate instruction defined "use of force or threat of force." However, the issues instruction stated that defendant could be convicted of aggravated criminal sexual assault upon a finding that he had committed an act of sexual penetration while displaying a dangerous weapon. As a matter of plain error, the Appellate Court found that the incomplete instruction denied defendant a fair trial. The Court stated, "while it may be gleaned from the four instructions. . . that the use of force or the threatened use of force is an element of the crime, such a proposition is not readily evident from a reading of these instructions. Furthermore, standing alone, the elements instruction setting forth expressly what it is that the State must prove is erroneous, as it lacks the element of use of force or the threatened use of force."

People v. English, 287 Ill.App.3d 1043, 679 N.E.2d 494 (3d Dist. 1997) At defendant's trial for aggravated battery, the trial court gave the jury an instruction which states that a person "is not authorized to use force to resist an arrest which he knows is being made by a peace officer, even if he believes that the arrest is unlawful and the arrest is in fact unlawful." Defendant was not charged with resisting arrest; the aggravated battery charge concerned fighting with officers at the police station, long after the arrest occurred. The trial judge erred by giving a "resisting arrest" instruction where the defendant was not charged with that crime. A jury can be instructed only on the crimes charged or offenses included within those crimes. The "natural result of giving an instruction based on an uncharged crime is prejudice to the defendant," because such an instruction injects into the case an issue that is not properly before the jury. The defendant was prejudiced by the erroneous instruction because he claimed that he acted in self-defense when he struck the officer. The erroneous instruction, which stated defendant could not resist even an unlawful arrest, could have led the jury to conclude that he was not entitled to defend himself at the police station even if he was being assaulted.

People v. Suter, 292 Ill.App.3d 358, 685 N.E.2d 1023 (4th Dist. 1997) IPI Criminal No. 3.01, which provides that the State need not prove the exact date on which the offense occurred, should be given only where there is a technical, nonfatal variance between the date charged and that shown by the evidence. The fact that the defendant presented an alibi defense did not create a variance; "an alibi does not constitute evidence that the offense occurred on another date." In addition, the Court held that IPI 3.01 should not be given where to do so would unfairly interfere with an alibi defense for a certain date.

Cumulative Digest Case Summaries **§32-8(a)**

People v. Bailey, 2013 IL 113690 (No. 113690, 3/21/13)

Where specific findings by the jury with regard to the offenses charged could result in different sentencing consequences, the trial court abuses its discretion when it refuses a request for specific verdict forms. Refusal of separate verdict forms is not harmless when it is not possible to determine from a general verdict that the jury actually found the defendant guilty of each count and this lack of specificity has adverse sentencing consequences for the defendant. The appropriate remedy in such a case is to interpret the general verdict as a finding that would result in the more favorable sentencing consequence for the defendant.

Defendant was charged with intentional, knowing, and felony murder. He elected to have the court determine his eligibility for a death sentence after the State announced its intention to seek the death penalty. At trial, the court refused defendant's request for separate verdict forms on felony murder. The jury returned a general verdict of guilty on the murder charges. The court sentenced defendant to natural life based on its finding that defendant was death eligible because the murder was committed in the course of an inherently violent felony while defendant acted with the intent to kill or knowledge that his acts created a strong probability of death or great bodily harm.

Relying on **Beck v. Alabama**, 447 U.S. 625 (1980), and **Bullington v. Missouri**, 451 U.S. 430 (1981), the Illinois Supreme Court concluded that where a jury in a capital case renders a verdict in the guilt phase that contradicts a fact necessary for a finding of eligibility at the sentencing phase, neither the jury nor the court can make an eligibility finding contradicting the jury's verdict. Therefore, if the jury in defendant's case had been given separate verdict forms and had acquitted defendant of intentional or knowing murder, the court would have been foreclosed from finding defendant death eligible because the jury's verdict would have negated an essential element of the death eligibility factor.

Because the defendant's request for separate verdict forms had sentencing consequences, the court abused its discretion in denying the request. The error is not harmless. Even though there is evidence that could support a finding that the murder was committed knowingly or intentionally, it cannot be ascertained from the jury's general verdict whether the jury actually found defendant guilty of intentional or knowing murder or only of felony murder. The general verdict must be interpreted as a verdict of guilty of felony

murder only and as an acquittal of intentional and knowing murder. Because such a verdict foreclosed the court from finding defendant death eligible and sentencing him to natural life, the court vacated defendant's sentence and remanded for resentencing of defendant to a term of years.

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

People v. Downs, 2015 IL 117934 (No. 117934, 6/18/15)

1. The Federal Constitution does not require or prohibit a jury instruction defining reasonable doubt. A reasonable doubt instruction violates due process only if there is a reasonable likelihood that the jurors understood the instruction to allow conviction upon proof that is less than beyond a reasonable doubt.

Illinois, like some other jurisdictions, does not define reasonable doubt. The rationale behind this rule is that "reasonable doubt" is self-defining and needs no amplification. Thus, not only is there no IPI definition of "reasonable doubt," the Committee Notes state that no instruction should be given. IPI Criminal 4th No. 2.05, Committee Note.

2. During deliberations, the jury asked, "What is your definition of reasonable doubt, 80%, 70%, 60%?" The court concluded that the trial judge did not err by responding, "We cannot give you a definition[;] it is your duty to define." The court concluded that this answer was "unquestionably correct" in light of Illinois precedent that the jury should not be given a definition of reasonable doubt.

The court rejected the argument that error occurred in the context of this case because in view of the jury's reference to percentages ranging from 60 - 80%, the failure to provide a definition allowed the jury to use a standard that was less than reasonable doubt. The court noted the difficulty of giving a cogent definition of "reasonable doubt," and held that in its view "it is better to refrain" from giving a definition at all. The court also noted that defense counsel did not object to the trial court's response and that had error occurred the issue could only be reached as plain error.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Sargent, 239 Ill.2d 166, 940 N.E.2d 1045 (2010)

725 ILCS 5/115-10 authorizes the trial court to admit hearsay statements made by minor declarants who are the victims of specified sex offenses, if the court finds that the statements provide sufficient guarantees of trustworthiness. If such hearsay is admitted, the court "shall instruct the jury that it is for the jury to determine the weight and credibility to be given the statement and that, in making the determination, the court shall consider the age and maturity of the child, . . . the nature of the statement, the circumstances under which the statement was made, and any other relevant factor." (725 ILCS 5/115-10(c))

The court acknowledged that the trial court erred by failing to instruct the jury in accordance with §115-10, but held that defense counsel waived the issue by failing to request an instruction and present the issue in the post-trial motion. Furthermore, the plain error rule did not apply.

The plain error rule permits a reviewing court to consider a forfeited issue when a clear and obvious error occurs and: (1) the evidence is so closely balanced that the error threatened to tip the scales of justice against the defendant, or (2) the error is so serious that it affects the fairness of the trial. Here, the evidence was not closely balanced concerning the two convictions which were affirmed.

Furthermore, the error did not affect the fairness of the trial. The function of jury instructions is to accurately convey the law applicable to the evidence. The erroneous submission of a jury instruction constitutes plain error under the "fundamental fairness" prong only if there is a serious risk that the jurors convicted the defendant because they did not understand the law. There was no such risk here, because the jury was given an instruction based on the general IPI instruction concerning the credibility of witnesses (Crim. No. 1.02) and was therefore aware of many of the principles specified by §115-10.

The court stressed that it was not suggesting that courts have discretion to tender instructions based on general IPI instructions instead of the IPI instruction implementing §115-10 (IPI Crim. No. 11.66), but only that under the circumstances of this case the failure to comply with §115-10 did not constitute plain error.

(Defendant was represented by Assistant Defender Deborah Pugh, Chicago.)

People v. Washington, 2012 IL 110283 (No. 110283, 1/20/12)

The question of whether sufficient evidence exists to support the giving of a jury instruction is a question of law subject to *de novo* review.

Both self-defense and second-degree murder instructions must be given on request when any evidence is presented showing the defendant's subjective belief that the use of force was necessary. Once presented with evidence of an actual belief in the need for the use of force in self-defense, it is for the jury to determine whether the subjective belief existed, and whether it was objectively reasonable or unreasonable. To obtain a jury instruction on second-degree murder, it is not necessary for a defendant to also produce evidence that his subjective belief was unreasonable.

Because the court granted defendant's request for self-defense instructions, it was error to deny his request for second-degree murder instructions.

People v. Wilmington, 2013 IL 112938 (No. 112938, 2/7/13)

1. Supreme Court Rule 431(b) requires the trial court to question prospective jurors concerning whether they understand and accept several principles, including that the defendant is presumed innocent, that the State must prove guilt beyond a reasonable doubt, that the defendant need not offer any evidence, and that the defendant's failure to testify cannot be held against him. The court's method of inquiry must provide each veniremember with an opportunity to respond to specific questions concerning the four principles.

The trial court admonished the veniremembers concerning the principles, and subsequently asked whether they accepted three of them - the presumption of innocence, the reasonable doubt standard, and the fact that defendant was not required to present evidence. However, the trial court failed to ask whether the jurors understood the above three principles, and failed to ask whether the jury understood or accepted that they could not hold the defendant's failure to testify against him. However, no objection was raised in the trial court.

The plain error rule allows consideration of errors that were not challenged in the trial court if either: (1) the evidence is so closely balanced that the error threatened to tip the scales of justice against the defendant; or (2) the error was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process. In **People v. Thompson**, 238 Ill.2d 598 (2010), the Supreme Court held that where the second prong of the plain error requirement is involved, the defendant is entitled to relief only if he or she can establish that the violation of Rule 431(b) resulted in a biased jury. Here, defendant argued an issue not reached in **Thompson** – whether the first prong of the plain error rule applied because the evidence was closely balanced.

The court concluded that the evidence was not closely balanced, and that the first prong therefore did not apply. Although the jury sent notes to the judge during deliberations, there was no indication that it had reached an impasse or experienced trouble reaching a verdict. In addition, the testimony of the expert witnesses did not render the case closely balanced.

Furthermore, there was unrebutted evidence that the defendant gave an inculpatory statement that was corroborated by at least some of the physical evidence. The sole inconsistency of any significance between defendant's statement and the physical evidence concerned the clothes worn by the decedent when his body was found. The court concluded that this "lone inconsistency [was not] sufficient to render the evidence in this case closely balanced for purposes of first-prong plain error."

2. Under Illinois law, five decisions ultimately belong to the defendant after consultation with his attorney: (1) what plea to enter, (2) whether to waive a jury trial, (3) whether defendant will testify, (4) whether to appeal, and (5) whether to submit an instruction on a lesser included offense. The latter decision is left to the defendant because electing to submit a lesser included offense instruction exposes the defendant to possible criminal liability which he might otherwise avoid and amounts to a stipulation that the jury could rationally convict of the lesser included offense.

3. The court concluded that the same rationale does not apply where defense counsel requests an instruction on second degree murder. Second degree murder is not a lesser included offense of first degree

murder, but rather a lesser-mitigated offense requiring that all of the elements of first degree murder, plus a mitigating factor, have been proved. The court concluded that because the defendant is not exposing himself to potential criminal liability which he might otherwise avoid, he does not have the right to decide whether an instruction on second degree murder should be submitted.

(Defendant was represented by Assistant Defender Brian Koch, Chicago.)

People v. Zimmerman, 239 Ill.2d 491, 942 N.E.2d 1228 (2010)

720 ILCS 5/24-1.6(a)(3)(D) creates the offense of aggravated unlawful use of a weapon for possession of a weapon by a person who has been adjudicated delinquent for an act which would have been a felony if committed by an adult. The court concluded that the plain language of §24-1.6 establishes that the prior juvenile adjudication is an element of aggravated unlawful use of a weapon, and not merely a factor enhancing the sentence for misdemeanor unlawful use of a weapon.

The court noted that §24-1.6 defines the offense of aggravated unlawful use of a weapon, and does not merely enhance the sentence for misdemeanor UUW, which is defined in a different section. The court also noted that §24-1.6 contains eight other factors, all of which constitute elements of the offense, and that it would have been illogical for the General Assembly to include one sentence enhancing factor.

Because the prior juvenile adjudication was an element of the offense, 725 ILCS 5/111-3(c) does not apply. (Section 111-3(c) states that the charge must include a prior conviction used to enhance the sentence for an offense, but the prior conviction is not to be disclosed to the jury.) Thus, the trial court did not err by informing the jury of a stipulation that defendant had a prior juvenile adjudication which satisfied the requirement of the offense.

(Defendant was represented by Deputy Defender Pete Carusona, Ottawa.)

People v. Anderson, 407 Ill.App.3d 662, 944 N.E.2d 359 (1st Dist. 2011)

Defendant was convicted of residential burglary after the evidence showed that two entries were made to a residence. Defendant entered the home and began looking around a few minutes after the residents returned to find that a burglary had occurred. He was in possession of a set of keys which had been left on the counter when the occupants left before the burglary.

Defendant told police that he had acted as a lookout when the residence was entered by another person, and that he had been given a set of keys by the first person to see if there was anything else in the residence to steal. At trial, however, defendant testified that in a drug exchange which occurred earlier in the evening, an occupant of the residence had given a set of keys to a relative of the person who first entered the apartment. Defendant testified that when he entered the residence, he was going to attempt to trade the keys for $20.

Defendant argued that the trial court erred by giving an accountability instruction, because the indictment charged him only in connection with his own entry to the residence. Defendant argued that the erroneous instruction created the possibility that he was convicted based on an uncharged offense - his role as a lookout for the first entry.

Without explaining its holding, the Appellate Court affirmed the trial court's finding that the first and second entries constituted a single burglary. The court also found that if there were separate burglaries, reversal would not be required.

First, in the trial court the State sought to convict defendant as either a principal or an accomplice. Thus, this is not a case in which the State attempted to raise a new theory of culpability on appeal.

Second, the harmless error rule applies where a jury is instructed on multiple theories of guilt, one of which is improper, and the issue is preserved for review. Thus, reversal is not required if in the absence of the error, a rational jury could have found that defendant was guilty beyond a reasonable doubt. Because there was sufficient evidence on which the jury could have concluded that defendant was guilty of burglary based on his own entry to the residence, any error created by instructing concerning the first entry was harmless.

(Defendant was represented by Assistant Defender Bryon Reina, Chicago.)

People v. Berardi, 407 Ill.App.3d 575, 948 N.E.2d 98 (3d Dist. 2011)

The court noted, in passing, that the trial court erred by refusing to give an instruction which defendant tendered and which stated that mere verbal resistance or argument does not constitute the offense of resisting an officer. Because there was evidence to support defendant's argument that he merely challenged the validity of an order to leave a city office, the failure to give the tendered instruction removed a disputed issue from the jury's consideration. Thus, a new trial would have been required had the court not reversed the conviction for lack of evidence. (See **DISORDERLY, ESCAPE, RESISTING AND OBSTRUCTING OFFENSES**, § 16-2).

People v. Coan, 2016 IL App (2d) 151036 (No. 2-15-1036, 6/29/16)

Under the invited-error doctrine, a defendant may not request to proceed in one manner at trial and later argue on appeal that error occurred. To permit a defendant to use the exact ruling or action that he procured at trial as a means of reversal on appeal would offend notions of fair play and encourage duplicitous behavior. Even plain-error review is forfeited when a defendant invites the error.

Here defendant failed to object to an incorrect jury instruction tendered by the State. The court rejected the State's attempt to portray this as invited error. The State, not defendant, tendered the instruction, and the failure to object did not mean that defendant agreed on the record to using the instruction. In this circumstance, the issue should be reviewed under the plain error doctrine.

People v. Colbert, 2013 IL App (1st) 112935 (No. 1-11-2935, 11/8/13)

The function of jury instructions is to provide the jury with accurate legal principles to apply to the evidence so that it can reach a correct conclusion. In a criminal case, fundamental fairness requires that the trial court fully and properly instruct the jury on the elements of the offense, the burden of proof, and the presumption of innocence. The issue of whether the jury instructions accurately conveyed the applicable law to the jury is reviewed *de novo*.

The Appellate Court rejected the defendant's argument that the court should have instructed the jury that to convict of felony murder it had to find the acts comprising the predicate felony of mob action had an independent felonious purpose. The issue of whether a forcible felony can serve as a predicate felony to felony murder is a question of law for the trial judge based on an examination of whether the evidence is sufficient to show that the predicate felony has an independent felonious purpose apart from the murder itself.

(Defendant was represented by Assistant Defender Tom Gonzalez, Chicago.)

People v. Cook, 2014 IL App (1st) 113079 (No. 1-11-3079, 5/8/14)

In deciding whether a trial court erred in refusing a jury instruction, the reviewing court must determine whether the instructions given as a whole, fairly, fully, and comprehensively apprised the jury of the relevant law. The correctness of jury instructions depends on whether ordinary persons would fail to understand them. The court does not need to define words or phrases that are self-defining or commonly understood.

The trial court erred in failing to instruct the jury on the definition of "reckless" as it applies to involuntary manslaughter. The jury was instructed with Illinois Pattern Jury Instruction (IPI), No. 7.07. which states that a person commits involuntary manslaughter when he unintentionally cause death "by acts which are performed recklessly." The committee note to IPI 7.07 states that the court should give IPI 5.01, which defines "recklessness," and states that a person acts recklessly "when he consciously disregards a substantial and unjustifiable risk," and "such disregard constitutes a gross deviation from" a reasonable standard of care.

The Appellate Court read the Illinois Supreme Court's decision in **People v Hopp**, 209 Ill.2d 1 (2004), as making the committee note to IPI 7.07 (directing the court to give IPI 5.01) a mandatory requirement. Additionally, the Appellate Court noted that a lay person may misunderstand recklessness to

mean ordinary negligence. The trial court thus erred in refusing to instruct the jury with IPI 5.01 defining recklessness.

The error however was harmless since the evidence in support of the verdict was so clear and convincing that the result of trial would not have been different had the jury been properly instructed.

(Defendant was represented by Assistant Defender Brett Zeeb, Chicago.)

People v. Daniel, 2014 IL App (1st) 121171 (No. 1-12-1171, 5/22/14)

The State charged defendant with armed robbery while armed with a firearm, but the jury was incorrectly instructed that the charge was armed robbery while armed with a dangerous weapon. Although this was error, it was not reversible under the plain-error doctrine.

The plain-error doctrine permits a reviewing court to consider a forfeited error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant, regardless of the seriousness of the error, or (2) the error is so serious that it affected the fairness of defendant's trial and the integrity of the judicial process, regardless of the closeness of the evidence.

The first prong of the plain-error doctrine did not apply because there was overwhelming evidence that defendant was armed with a firearm, and indeed it was undisputed at trial that he carried a firearm. The second prong did not apply because Illinois courts have narrowed this prong to errors that are structural: systemic errors that erode the integrity of the judicial process and undermine the fairness of trial. Although the jury instructions misstated the law, they did not fall within the class of errors deemed structural.

The conviction was affirmed.

(Defendant was represented by Assistant Defender Emily Hartman, Chicago.)

People v. Dupree, 397 Ill.App.3d 719, 922 N.E.2d 503 (2d Dist. 2010)

1. Neither the federal nor Illinois constitutions afford a criminal defendant the constitutional right to attend a jury instruction conference. However, "the better practice would be to allow a defendant to attend" the instructions conference.

2. Under **People v. Brocksmith**, 162 Ill.2d 224, 642 N.E.2d 1230 (1994), a defendant has a personal right to decide whether to tender an instruction on a lesser included offense. The court questioned whether an alleged **Brocksmith** violation is itself a constitutional violation which can be raised in a post-conviction petition, or whether the issue may be raised in post-conviction proceedings only by a claim of ineffective assistance of counsel. The court declined to resolve this question because the petition raised the issue in terms of ineffective assistance.

3. The court concluded that **Brocksmith** applies to the decision whether to tender second degree murder instructions, although second degree murder is technically not a lesser included offense of first degree murder. The court concluded that the rationale of **Brocksmith** – that a defendant who tenders an instruction on a lesser included offense risks exposure to conviction on an uncharged offense – applies equally to second degree murder.

4. Defendant's post-conviction petition raised the gist of an issue of ineffective assistance of counsel where defendant's affidavit indicated that counsel, rather than the defendant, decided not to request second degree murder instructions. The court found that there was an adequate basis in the evidence on which second degree instructions could have been given. In addition, where defendant argued that he acted in self-defense during a confrontation between members of rival gangs, there was an arguable probability that a second degree murder instruction would have changed the result of the trial.

The order summarily dismissing the post-conviction petition was reversed.

(Defendant was represented by Assistant Defender Jack Hildebrand, Elgin.)

People v. Falco, 2014 IL App (1st) 111797 (No. 1-11-1797, 8/12/14)

Jury instructions are necessary to provide the jury with the correct legal principles, allowing it to

reach a correct verdict. Under Illinois Supreme Court Rule 451(a), an IPI instruction should be used unless it does not accurately state the law. Where no IPI instruction exists, the court may give a non-IPI instruction.

Defendant was convicted of possession of a firearm with defaced identification marks. 720 ILCS 5/24-5(b). The jury was instructed with a non-IPI instruction which tracked the language of the statute defining the offense but, like the statute, omitted any reference to a mental state.

Counsel was ineffective for failing to request an instruction informing the jury that to prove defendant guilty of the charged offense, the State had to prove that he knowingly or intentionally possessed the firearm. Although the statute defining the offense of possession of a firearm with a defaced serial number does not specify a mental state, Illinois law is clear that the State must prove that the defendant intentionally or knowingly possessed the firearm, although the State does not have to prove that defendant knew of the defacement.

Where the statute does not specify a mental state, and instead one is implied, it is not always necessary to instruct the jury on the necessary mental state. Some mental states, however, may be specific enough to require a jury instruction. Here, the implied mental state of intent and knowledge was specific enough to require instruction. The present offense was no different than any other possession charge. Typical possession cases, such as unlawful use of a weapon, require the State to prove knowing possession and the corresponding IPI instructions inform the jury of this element.

There is no IPI instruction for the offense at issue here, but the jury should have been instructed with a modified instruction that included the appropriate mental state as one of the elements of the offense. In the absence of such an instruction, the jury could have concluded that this was a strict liability offense; there was no likelihood that the jury would have understood that knowledge was the appropriate mental state or that knowledge applied only to possession, not to defacement.

The conviction was reversed and remanded for a new trial.

People v. Fonder, 2013 IL App (3d) 120178 (No. 3-12-0178, 9/30/13)

Defendant was convicted of felony resisting arrest, which requires the State to prove beyond a reasonable doubt that: (1) defendant knowingly resisted or obstructed a peace officer in the performance of an authorized act within his capacity, and (2) defendant's act was the proximate cause of injury to the officer. In instructing the jurors, the trial judge gave only the IPI instructions for the misdemeanor offense of resisting arrest, which requires that the State establish beyond a reasonable doubt the defendant knowingly resisted or obstructed the performance of any authorized act that was within the official capacity of one known to be a peace officer.

The Appellate Court concluded that the trial judge committed plain error by failing to instruct the jury on a critical element of the felony offense charged - that defendant's conduct proximately caused injury to the officer. Jury instructions are intended to provide the jury with the legal principles applicable to the evidence, so that it might reach a correct conclusion according to the law and the evidence. Generally, the decision to give a certain instruction rests in the sound discretion of the trial court. However, when the issue is whether the applicable law was correctly conveyed by the instructions to the jury, *de novo* review is appropriate.

The failure to instruct the jury on an essential element of the offense satisfied the second prong of the plain error rule - for fundamental error that is so serious that it affects the fairness of the trial and challenges the integrity of the judicial process. Fundamental fairness requires trial courts to insure that the jury receives basic instructions essential to a fair determination of the case. Here, the missing element was critical because it elevated the offense from a misdemeanor to a felony and increased the sentencing range.

Defendant's conviction was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Steve Omolecki, Ottawa.)

People v. Franklin, 2012 IL App (3d) 100618 (No. 3-10-0618, 6/7/12)

1. The United States Constitution does not prohibit courts from defining reasonable doubt, but a

reasonable-doubt instruction is constitutionally deficient if it does not correctly convey the concept of reasonable doubt. A defendant's due process rights are violated if there is a reasonable likelihood that the jurors understood the instruction to allow a conviction based on proof less than beyond a reasonable doubt. A constitutionally-deficient reasonable-doubt instruction qualifies as structural error.

2. Illinois prohibits judges and counsel from defining reasonable doubt because the concept of reasonable doubt needs no explanation. The committee notes to the Illinois Pattern Jury Instructions recommend that no instruction be given defining the reasonable doubt standard for the jury. Where a court instructs the jury on the meaning of reasonable doubt, the prejudice to the defendant is compounded when the prosecutor refers to the instruction in closing argument. A defective reasonable-doubt instruction qualifies as a structural error that requires reversal.

3. Generally, an issue concerning the propriety of a jury instruction is reviewed under an abuse-of-discretion standard; however, review is *de novo* when the issue is whether the applicable law was correctly conveyed in the jury instruction.

4. During jury selection, the court told potential jurors, "Beyond a reasonable doubt means beyond a reasonable doubt. It's what each of you individually and collectively, as 12 of you, believe is beyond a reasonable doubt." In rebuttal closing argument, the prosecutor reminded the jurors that the judge had provided them the definition of reasonable doubt: "Reasonable Doubt is what you believe to be reasonable doubt. You decide what reasonable doubt is. Not [defense counsel], not the State, you decide."

The court's instruction to the jury violated the Illinois Supreme Court's mandate that trial courts not define reasonable doubt for the jury. The error was compounded by the prosecutor's argument to the jury. The instruction was also constitutionally deficient because there is a reasonable likelihood that the jurors understood the instruction to allow a conviction based on proof less than beyond a reasonable doubt. Because the instruction was constitutionally deficient, it is structural error that requires reversal.

Carter, J., dissenting in part, concluded that under the totality of the circumstances, there was no reasonable likelihood that the jurors understood that the instruction allowed it to find defendant guilty upon a standard of proof that was less than beyond a reasonable doubt. The jury was told numerous times that the defendant was presumed innocent, that the State bore the burden of proof, and that the jury was required to find defendant not guilty unless the State proved all of the elements of each count beyond a reasonable doubt. During closing arguments, defense counsel reiterated that the reasonable-doubt standard was the highest standard of proof available under the law.

(Defendant was represented by Assistant Defender Bryon Reina, Chicago.)

People v. Hale, 2012 IL App (4th) 100949 (No. 4-10-0949, 3/29/12)

The purpose of jury instructions is to provide the jury with the correct legal principles applicable to the evidence, so that the jury may reach a correct legal conclusion according to the law and the evidence. Although generally the decision to give certain jury instructions rests with the court and that decision will not be reversed on appeal absent an abuse of discretion, the issue of whether the instructions accurately conveyed to the jury the applicable law is reviewed *de novo*.

Fundamental fairness requires that the jury be instructed on the elements of the offense charged. It is the essence of a fair trial that the jury not be permitted to deliberate on a defendant's guilt or innocence without being told the essential characteristics of the crime charged.

Defendant was charged with threatening a public official. Because of the official's position as a law enforcement officer, the State was required to prove not only that the defendant threatened the officer, but also that the threat contained specific facts indicative of a unique threat to the person, family or property of the officer, and not a generalized threat of harm. 720 ILCS 5/12-9(a-5). The jury was not instructed that to convict defendant it had to find that additional element.

This omission deprived the jury of the guidance needed to decide whether the State proved the additional element. It is possible that the jury concluded that defendant made a generalized threat to the officer, but the statute required more before defendant could be convicted. Because a clear and obvious error

occurred that undermined the fairness of defendant's trial and challenged the integrity of the judicial process, the court reversed the conviction and remanded for a new trial.

(Defendant was represented by Assistant Defender Janieen Tarrance, Springfield.)

People v. Higgins, 2016 IL App (3d) 140112 (No. 3-14-0112, 3/24/16)

1. Under **People v. Brocksmith**, 162 Ill. 2d, 224, 642 N.E.2d 1230 (1994), whether to submit a lesser-included offense instruction is one of five decisions which belong exclusively to the defendant and not to defense counsel. In **Brocksmith**, the court recognized that the decision to tender a lesser-included offense instruction is analogous to the decision to plead guilty and may result in a loss of liberty based on an uncharged offense.

2. Where defense counsel tenders a lesser-included defense instruction, the trial court must inquire of defense counsel, in defendant's presence, whether counsel has advised defendant of the potential penalties associated with the lesser-included offense and whether the defendant agrees with the decision to tender the lesser offense. **People v. Medina**, 221 Ill.2d 394, 851 N.E.2d 1220 (2006). Here, the court concluded that the trial court's duty to inquire applies only if defense counsel tenders the lesser-included offense instruction. Where the State requests a lesser-included offense instruction, the trial court need not ensure that defendant agrees with defense counsel's decision to not object to the instruction.

3. The court noted that in this case, the decision to not object to the lesser-included offense instruction appears to have been a valid and effective trial strategy. On the greater offense, defendant would have been subject to a sentencing range of 15 to 60 years. By not objecting the lesser-included offense instruction tendered by the State, defendant avoided a more serious conviction and received a sentence of 12 years, three years less than minimum sentence he could have received on the greater offense.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Joy Reedy, Chicago.)

People v. Jenkins, 2016 IL App (1st) 133656 (No. 1-13-3656, 2/6/16)

To convict a defendant of felony resisting or obstructing a police officer, the State must prove that defendant knowingly resisted or obstructed an officer in the performance of an authorized act, and his violation proximately caused an injury to the officer. 720 ILCS 5/31-1(a), (a-7). Proximate cause of injury is the element that elevates this offense from a Class A misdemeanor to a Class 4 felony.

Here defendant was charged with and convicted of the felony version of this offense, but the trial court committed error by failing to instruct the jury on the proximate cause of injury element.

Although defendant failed to object, the Appellate Court found that the incorrect instruction constituted plain error under the closely balanced evidence prong of the plain error doctrine. The arresting officer testified that as he tried to arrest defendant, defendant struggled with him and kicked him in the face causing and injury. Defendant, by contrast, testified that he did not resist arrest, but only started kicking and screaming in pain after the officer sprayed mace in his face.

The conflicting testimony showed that the jury had to make a judgment of credibility about whether defendant kicked the officer while he was resisting arrest. Where a judgment depends solely on the credibility of witnesses at trial, the evidence is closely balanced.

Defendant's conviction was reversed and remanded for a new trial.

(Defendant was represented by Assistant Defender Phil Payne, Chicago.)

People v. Kirkland, 2013 IL App (4th) 120343 (No. 4-12-0343, 11/13/13)

1. Whether a jury verdict is sufficient depends on whether the jury's intention can be ascertained with reasonable certainty from the language of the verdict. All parts of the record must be examined and interpreted together in order to determine the meaning of a verdict. An improper verdict is not necessarily cured by the fact that proper jury instructions were given. Where the jury's verdict is unambiguous, the trial court may not speculate about the jury's intentions.

2. Defendant was charged with two counts of aggravated criminal sexual abuse against separate victims, but the guilty verdict for one of the victims stated the offense as "criminal sexual abuse" rather than "aggravated criminal sexual abuse." The court concluded that because neither party raised the issue in the trial court and defendant challenged the verdict form for the first time on appeal, defendant had the burden to show plain error. The plain error rule applies where a clear or obvious error threatened the fairness of the trial due to the closeness of the evidence, or because the error is so serious as to affect the fairness of the trial or the integrity of the judicial process.

The State conceded that the erroneous verdict form constituted a clear and obvious error. However, the court concluded that the plain error rule did not apply.

First, the court found that the evidence was not closely balanced where there were independent witnesses who corroborated the testimony of the complainants and defendant made admissions which went to the issues of the case.

Second, defendant failed to show that the erroneous verdict form caused fundamental error where the parties at no time suggested that the jury could consider any offense other than aggravated criminal sexual abuse and the jury instructions (other than the verdict form) referred to no other offense. The court also noted that the evidence concerning both victims was nearly identical. Under these circumstances, the omission of the word "aggravated" constituted a typographical error that did not cause prejudice.

Because the record as a whole showed that the jury intended to convict of aggravated criminal sexual abuse, no error occurred. However, the court stated that its holding "is not meant to downplay the critical importance of accurate jury instructions and verdict forms, as it was the factual uniqueness of this case which prompted this opinion." The court cautioned that attorneys and judges should "carefully read through all presented instructions to ensure the instructions contain no mistakes, lest an avoidable error mars an otherwise fair trial. . . ."

(Defendant was represented by Assistant Defender Arden Lang, Springfield.)

People v. Leach, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-09-0339, 5/31/11)

1. Although jury instructions are to be settled before closing arguments, the jury may be entitled to further instructions if it poses a question during deliberations. Generally, the trial court has a duty to provide further instruction where the jury poses an explicit question or requests clarification on a point of law arising from facts about which there is doubt or confusion. However, the trial court may refuse to answer a jury question where the instructions are readily understandable and sufficiently explain the relevant law, where further instructions would serve no useful purpose or might mislead the jury, where the jury's inquiry involves a question of fact, or where the giving of an answer would cause the court to express an opinion that would likely direct a verdict one way or the other. In addition, the court should not submit new charges or theories to the jury after deliberations have started.

2. Defendant was charged with aggravated discharge of a firearm for discharging a firearm in the direction of "Anthony White." The evidence showed that defendant discharged the firearm toward a group of several persons.

The instructions indicated that to convict, the jury was required to find that defendant discharged the firearm in the direction of White. During deliberations, the jury asked whether the aggravated discharge charge applied only to White. The trial court responded by giving a new instruction that replaced the phrase "Anthony White" with the phrase "another person."

The Appellate Court concluded that the trial judge did not err by responding to the inquiry. The jury's request was explicit and concerned a specific charge relating to a specific fact. Furthermore, the inquiry concerned a question of law and indicated that the jury was confused about whether the charge applied to anyone other than White. Under these circumstances, the trial court acted properly by answering the question.

Furthermore, the court did not err by giving the replacement instruction. The court noted that the essential elements of aggravated discharge of a firearm are that the defendant knowingly or intentionally discharged a weapon in the direction of another. Because the name of a specific victim is not an element of

the offense, the addition of White's name to the charge was mere surplusage. Thus, by giving the revised instruction the trial court did not issue a new theory of liability or deprive the defendant of an opportunity to prepare a defense or make an effective closing argument.

Defendant's conviction for aggravated discharge of a firearm was affirmed.

(Defendant was represented by Assistant Defender Laura Weiler, Chicago.)

People v. Lindsey, 2016 IL App (1st) 141067 (No. 1-14-1067, 6/14/16)

Theft of property not exceeding $500 is a Class A misdemeanor. 720 ILCS 5/16-1(b)(1). Theft is elevated to a Class 4 felony if it is committed in a place of worship. 720 ILCS 5/16-1(a)(1)(A). A place of worship is a "church, synagogue, mosque, temple, or other building...used primarily for religious worship and includes the grounds of a place of worship." 720 ILCS 5/2-15b.

Any enhancement factor, other than a prior conviction, which increases the range of penalties must be submitted to the jury and proved beyond a reasonable doubt. **Apprendi v. New Jersey**, 530 U.S. 466 (2000). Although **Apprendi** errors are subject to harmless-error review, the State bears the burden of proving beyond a reasonable doubt that the outcome of trial would have been the same without the error.

A jury convicted defendant of Class 4 felony theft from a place of worship. But the jury was never instructed that the theft had to be committed in a place of worship. The court found that the failure to properly instruct the jury was reversible error since under the facts of this case the omitted instruction was not harmless beyond a reasonable doubt.

The theft took place in the parish office building located near the church. Defendant argued that the office building was entirely distinct from the church while the State argued that the office building was on the grounds of the church. The court noted that **Apprendi** errors have been found harmless only where the evidence was "uncontested and overwhelming," but here the issue was hotly contested and involved complex facts applied to a statutory definition subject to conflicting interpretations. In these circumstances, the error could not be deemed harmless.

The court reduced defendant's conviction to a Class A misdemeanor.

(Defendant was represented by Assistant Defender Emily Filpi, Chicago.)

People v. Lloyd, 2011 IL App (4th) 100094 (No. 4-10-0094, 11/16/11)

For purposes of the criminal sexual assault statute, 720 ILCS 5/12-12(f) defines "sexual penetration" as involving two broad categories of conduct. The first category includes any contact "between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person." Within this category, the term "object" does not include parts of the defendant's body, including fingers. The second category includes any "intrusion of any part of the body of one person . . . into the sex organ or anus of another person."

Defendant was convicted of criminal sexual assault for acts of "sexual penetration" involving his fingers and the complainant's vagina. At the State's request and without objection by the defense, the trial court gave the jury only the portion of IPI Crim. 4th, No. 11.65E concerning the first category - "contact" between the complainant's sex organ by "an object, the sex organ, mouth or anus of" the defendant.

The court concluded that concerning three of the four convictions, failing to give the proper definition of "sexual penetration" did not constitute plain error. For each of the three convictions, the complainant's testimony clearly demonstrated that defendant inserted his fingers into her vaginal opening. Because the uncontroverted evidence showed digital penetration, the result of the trial on those convictions would not have been different had the proper instruction been given.

Concerning the other conviction, however, the complainant's testimony did not clearly show penetration by the defendant's fingers. Based on the evidence, the jury could have found that no penetration occurred. Concerning this count, therefore, plain error occurred because the incorrect definitional instruction could have affected the outcome of the trial.

Defendant's criminal sexual assault conviction for Count I was reversed, but the other three convictions were affirmed.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

People v. Love, 2013 IL App (3d) 120113 (No. 3-12-0113, 9/24/13)

Illinois Rule of Evidence 201 governs judicial notice of adjudicative facts and provides that judicial notice may be taken at any stage of a proceeding. When a court allows a party's request to prove an adjudicative fact by judicial notice in a criminal proceeding, "the court shall inform the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." Ill. R. Evid. 201(g). This directive is rooted in the criminal defendant's constitutional right to a jury trial.

Outside the presence of the jury in a DUI prosecution, the court took judicial notice that the applicable conversion factor for blood serum alcohol content to whole blood alcohol content is 1.18, as provided by the Illinois Administrative Code. Over objection, the court gave the jury this non-IPI instruction regarding the conversion factor:

> In the course of this case, you have heard testimony about the results of a blood draw. There are two ways to measure blood alcohol concentration: by serum levels or by what is called whole blood. Whole blood is [the] standard used by law enforcement and legal proceedings, and it can be calculated by converting the serum level to the whole blood equivalent. In this case, the testimony was that the serum level was .190. The blood serum or blood plasma alcohol concentration results will be divided by 1.18 to obtain a whole blood equivalent. After conversion, the whole blood equivalent is .161.

This instruction violates Ill. R. Evid. 201. It contains no cautionary language advising the jury that it was not mandated to accept the identified conversion factor or adopt the calculations based on a formula using this factor. It also referenced a contested fact, defendant's purported blood serum level, that was not subject to judicial notice, and in this respect became testimonial.

The error was not harmless. A separate instruction informed the jury that *if* it found defendant's alcohol level was greater than 0.08, it *may* presume that defendant was under the influence of alcohol. The judicial notice instruction did not contain similar limiting language that the jury was not required to conclude that defendant's blood alcohol level was .161. The jury could have easily viewed the defective instruction to require it to find that defendant's blood alcohol level was twice the level that supported a strong but permissive presumption of intoxication.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

People v. Luna, 409 Ill.App.3d 45, 946 N.E.2d 1102 (1st Dist. 2011)

1. An instruction on a lesser offense is justified where there is credible evidence to support the giving of the instruction. Where there is evidentiary support for an instruction, the failure to give the instruction constitutes an abuse of discretion.

The court rejected the State's argument that a defendant who raises self-defense cannot seek an involuntary manslaughter instruction, because raising self-defense admits an intentional killing while involuntary manslaughter requires an unintentional killing by reckless actions that are likely to cause death or great bodily harm. Because Illinois law allows a criminal defendant to raise inconsistent defenses, the inconsistency between the mental states does not preclude either claim.

2. However, a defendant may not seek to reduce a first degree murder conviction to involuntary manslaughter based on a claim that he acted with a subjective intent that is not supported by any evidence other than the defendant's testimony. "Illinois courts have consistently held that when the defendant intends to fire a gun, points it in the general direction of his or her intended victim, and shoots, such conduct is not merely reckless and does not warrant an involuntary-manslaughter instruction, regardless of the defendant's assertion that he or she did not intend to kill anyone." (**People v. Jackson**, 372 Ill.App.3d 605, 874 N.E.2d 123 (4th Dist. 2007)). Because the evidence here unequivocally demonstrated that defendant intended to

swing a knife in the decedent's direction, and other than defendant's testimony there was no evidence that he merely intended to scare the decedent, an involuntary manslaughter instruction was not justified.

3. In **People v. Thompson**, 238 Ill.2d 598, 939 N.E.2d 403 (2010), the Supreme Court held that the trial court's failure to comply with Supreme Court Rule 431(b), which requires that the judge ascertain that jurors understand and accept four basic legal principles, satisfies the "fundamental error" prong of the plain error rule only if the defendant shows that the error resulted in a biased jury being impaneled. However, **Thompson** left open the issue whether Rule 431(b) violations could be plain error under the "closely balanced evidence" test.

Here, even if the evidence was closely balanced, defendant could not show prejudice from the trial court's failure to ensure that the venire understood and accepted the principle that no consideration could be given to a defendant's decision not to testify. Because the defendant did testify, the court concluded that he could not carry his burden of persuasion concerning plain error.

(Defendant was represented by Assistant Defender Julianne Johnson, Chicago.)

People v. McDonald, 401 Ill.App.3d 54, 927 N.E.2d 253 (1st Dist. 2010)

1. The trial court erred by instructing the jury concerning the elements of armed robbery and that a person who is committing a forcible felony may not claim self-defense, where the defendant was charged with first degree murder based on intent and knowledge and the jury was given a second degree murder instruction based on serious provocation and an unreasonable belief in self-defense. The prosecution knew before trial that defendant intended to raise self-defense, but did not seek to amend the charges to include armed robbery or first degree murder based on felony murder. By giving an instruction concerning an uncharged offense which had not been raised until the jury instruction stage, the trial court not only deprived the defendant of an opportunity to defend, but also may have suggested to the jury that the parties did not dispute that an armed robbery had occurred.

2. The court rejected the State's argument that an armed robbery instruction was necessary to rebut defendant's claim of self-defense. The trial judge agreed to give an "initial aggressor" instruction, which was supported by the evidence and which would have precluded self-defense if the jury believed defendant was the initial aggressor. Furthermore, because a finding that defendant was the initial aggressor would have negated the findings required for second degree murder - that defendant acted in an *unreasonable* belief that he was entitled to use deadly force or under serious provocation - the armed robbery instruction was not required for the State to rebut defendant's claim that at most he had committed second degree murder.

(Defendant was represented by Assistant Defender Laura Weiler, Chicago.)

People v. Reed, ___ Ill.App.3d ___, 919 N.E.2d 1106 (4th Dist. 2009) (No. 4-08-0056, 12/15/09)

The Appellate Court reiterated that no statutory authority exists for using special interrogatories in criminal cases. Thus, an answer to a special interrogatory concerning a sentence enhancement cannot be deemed inconsistent with a jury verdict for purposes of overturning that verdict. (See **People v. Jackson**, 372 Ill.App.3d 605, 874 N.E.2d 123 (4th Dist. 2007).) The court stressed that the answer to a special interrogatory should not be used for any purpose other than that for which the interrogatory was asked – whether there are grounds for a sentence enhancement.

The jury's negative answer to a special interrogatory whether defendant personally discharged a firearm which proximately caused death – asked in order to obtain a sentence enhancement under 730 ILCS 5/5-8-1(a)(1)(d) – cannot be used to challenge the jury's verdict convicting the defendant of first degree murder.

(Defendant was represented by Assistant Defender Nancy Vincent, Springfield.)

People v. Rexroad, 2013 IL App (4th) 110981 (No. 4-11-0981, modified 6/28/13)

A person of the age of 17 and upwards commits the offense of indecent solicitation of a child if the person, with the intent that the offense of aggravated criminal sexual assault, criminal sexual assault,

predatory criminal sexual assault of a child, or aggravated criminal sexual abuse be committed, knowingly solicits a child or one whom he believes to be a child to perform an act of sexual penetration or sexual conduct as defined in §12-12 of the Criminal Code. 720 ILCS 5/11-6(a). Defendant was charged with indecent solicitation of a child when he sent suggestive text messages to a police officer who was pretending to be a teenaged girl.

The instructions provided to defendant's jury defining the elements of indecent solicitation of a child were defective. They failed to require the jury to find that defendant knew or believed the child was under 17 years of age, and that defendant possessed the intent to commit aggravated criminal sexual abuse. The court noted that these pattern instructions (Nos 9.01, 9.01A and 9.02) have since been modified to correctly state the law.

The Appellate Court affirmed despite the error because it had been forfeited below and did not amount to plain error where the evidence was not closely balanced and the error did not affect defendant's defense that he was not the person who sent the text messages.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

People v. Robinson, 2016 IL App (1st) 130484 (No. 1-13-0484, 6/17/16)

An incorrect jury instruction constitutes second prong plain error where it creates a serious risk that the jury incorrectly convicted the defendant because it did not understand the applicable law.

The State charged defendant with aggravated kidnapping under the inducement theory of kidnapping in that he used deceit or enticement to induce the victim to go from one place to another with the intent to secretly confine her against her will. 720 ILCS 5/10-1(a)(3). But the jury was incorrectly instructed under the actual secret confinement theory of kidnapping that the State had to prove defendant secretly confined the victim against her will. 720 ILCS 5/10-1(a)(1).

The erroneous jury instruction constituted second prong plain error. The essential issue at trial was whether defendant induced the victim to accompany him using deceit and enticement. The jury instruction omitted this essential element. The jury thus conceivably convicted defendant without finding an essential element of the offense.

The court reversed the aggravated kidnapping conviction.

(Defendant was represented by Assistant Defender Meredith Baron, Chicago.)

People v. Rogers, 2012 IL App (1st) 102031 (No. 1-10-2031, 6/29/12)

1. Jury instructions convey the legal rules applicable to the evidence presented at trial and thus guide the jury's deliberations toward a proper verdict. There must be some evidence in the record to justify giving an instruction. Proposed instructions that are not supported by the evidence or the law should not be given.

The trial court decides, in the exercise of its discretion, which issues are raised by the evidence and whether a proposed instruction should be given. Its decision is reviewed for an abuse of discretion. A reviewing court must determine whether the instructions, considered together, fully and fairly announce the law applicable to the theories of the State and the defense. Where the instructions are not clear enough to avoid misleading the jury or if the instructions do not accurately state the law, the trial court has abused its discretion.

2. Defendant was charged with escape under the Electronic Home Detention Law (730 ILCS 5/5-8A-4.1) after he failed to report to the county sheriff's day-reporting program. He had been ordered to participate in that program as a condition of his probation.

Whether his failure to report to day reporting was a violation of a condition of electronic monitoring such that failure to report could be considered an escape under the statute, rather than merely a violation of a condition of probation was a contested issue of fact at trial. Nothing in the electronic-monitoring contract that defendant signed indicated that day reporting was a condition of electronic monitoring. The State presented witness testimony that electronic monitoring is a condition of day reporting, and that day reporting and electronic monitoring "work side by side."

The court instructed the jury that to sustain the charge of escape, the State had to prove that the defendant "knowingly violated a condition of the electronic home monitoring program detention program by failing to report to day reporting as required."

3. This instruction was erroneous because it did not apprise the jury that it would have to decide as a threshold issue whether day reporting was a condition of electronic monitoring, and then whether defendant violated that condition. The instruction misled the jury into believing that day reporting was a condition of electronic monitoring, and it merely had to decide whether defendant had failed to report to day reporting, thus relieving the State of its burden of proving an element of the escape charge. Therefore, the court abused its discretion in giving the instruction.

(Defendant was represented by Assistant Defender Linda Olthoff, Chicago.)

People v. Sangster, 2014 IL App (1st) 113457 (No. 1-11-3457, 3/31/14)

Defendant argued that the trial court improperly amended the jury instruction for first degree murder after closing arguments to include the concept of transferred intent, thereby introducing a new theory of guilt at a point in time when defendant had no opportunity to defend against the new theory.

During closing arguments, defendant argued that the shooting was an accident because defendant had no motive to shoot and kill the victim. The State brought up the concept of transferred intent in its rebuttal argument and argued that the victim's death was not an accident. After the arguments were concluded, the trial court sua sponte amended the first degree murder instruction to include the phrase "or another" to encompass the concept of transferred intent.

In **Millsap**, 189 Ill. 2d 155 (2000), the Illinois Supreme Court held that it was improper for the trial court to instruct the jury on accountability for the first time after the jury had begun deliberating. The court noted that jury instructions should be settled before closing arguments to allow the parties to tailor their arguments accordingly. By instructing the jury on accountability after deliberations had begun, the trial court deprived defendant of an opportunity to defend against that theory.

The Appellate Court held that unlike **Millsap**, no error occurred in this case. The trial court did not introduce a new theory of guilt when it amended the jury instruction to include the concept of transferred intent. The amendment did not change the elements of first degree murder since the State still had to prove that defendant performed the acts which caused death while acting with the requisite mental state. The only difference in the instruction was the name of the victim.

The court also noted that the trial court's amendment of the jury instruction was in direct response to defendant's closing argument that he was not guilty because he intended to kill someone other than the victim. The instruction was a proper response to defendant's argument opening the door to the concept of transferred intent.

(Defendant was represented by Assistant Defender Ginger Odom, Chicago.)

People v. Sito, 2013 IL App (1st) 110707 (No. 1-11-0707, 7/16/13)

The trial court must instruct the jury with an IPI Criminal instruction unless the court determines that it does not accurately state the law. Ill. S. Ct. R. 451(a). A reviewing court will not disturb the decision to instruct the jury with a non-IPI instruction absent an abuse of discretion.

The court abused its discretion in striking the element of knowledge from IPI Criminal 4th Nos. 16.17 and 16.18, the instructions defining and setting forth the elements of the offense of unauthorized possession or storage of weapons. Unauthorized possession or storage of weapons is not an absolute liability offense.

An error in a jury instruction is harmless if it is demonstrated that the result of the trial would not have been different had the jury been properly instructed. While there was evidence from which the jury could infer that defendant knowingly possessed the knife, the error was not harmless where the jury essentially was instructed not to consider defendant's testimony that he was not aware that he had a knife.

(Defendant was represented by former Assistant Defender Geoffrey Burkhart, Chicago.)

People v. Smith, 2015 IL App (4th) 131020 (No. 4-13-1020, 12/4/15)

Illinois Pattern Instructions, Criminal, Nos. 11.15 and 11.16, which define the offense of aggravated battery of a person over the age of 60, have not been updated to reflect 2006 amendments to the statute. Those amendments added, as an element of the offense, that the defendant knows the battered individual to be 60 or older. Before the 2006 amendments, knowledge of the age of the victim was not required.

Because IPI Criminal 4th Nos. 11.15 and 11.16 do not accurately convey the current state of the law, the court asked the Illinois Supreme Court Committee on Pattern Jury Instructions to consider updating the instructions.

(Defendant was represented by Assistant Defender Karl Mundt, Chicago.)

People v. Turman, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-09-1019, 6/30/11)

1. The term "reasonable doubt" is self-defining and needs no further elaboration. The principle that a jury is entitled to have its legal questions answered does not include a request to have reasonable doubt defined.

After deliberating several hours, the jury asked for a "more explicit, expansive definition of reasonable doubt." With the agreement of the parties, the court responded that "reasonable doubt is not defined under Illinois law. It is for the jury to collectively determine what reasonable doubt is."

By instructing the jury that it could collectively determine what reasonable doubt is, the court allowed the jury to use a standard that in all likelihood was below the threshold of the reasonable doubt standard. The best response for the court to have made would have been to refuse to give the jury an additional explanation.

The court found this instruction to be plain error under both prongs of the plain-error rule. A 17-year-old defendant was charged with criminal sexual assault of 19-year-old college student who had drunk excessive amounts of alcohol, on the theory that he knew that she was unable to give knowing consent to sexual acts. Faced with this difficult task, it was critical that the jury understand what standard of proof it was to utilize. Under the first prong, because of the closeness of the evidence, the clear error threatened to tip the scales of justice against the defendant. Under the second prong, the error was so serious that it affected the fairness of the defendant's trial and his right to due process, thereby challenging the integrity of the judicial process.

2. The court also found that the omission of language that it was for the jury to determine whether the defendant made the statement from an instruction regarding the jury's consideration of statement evidence (IPI Crim. 4th No. 3.06-3.07) was plain error. At trial, defendant denied making many of the statements contained in a written statement. He testified that the statement was never reread to him even though he signed each page of the statement, and asserted that he did not even know the definition of a word attributed to him in the statement. There was evidence supporting his denial as the grammar and language used by defendant in a note he wrote to the complainant was at odds with the language the prosecution claimed defendant used in the statement. Given the importance of the statement to the State's case and the closely-balanced nature of the evidence, the error "threatened to tip the scales of justice away from the defendant." It also satisfied the second prong of the plain-error rule as it "deprived the defendant of a fair trial and impacted the integrity of the judicial process.

This error was not cured by a separate instruction on the jury's consideration of prior inconsistent statement evidence (IPI Crim. 4th No. 3.11) that informed the jury that it was for the jury to determine if the "witness made the earlier [inconsistent] statement" because it was unclear which instruction the jury chose to follow.

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

People v. Walker, 2012 IL App (2d) 110288 (No. 2-11-0288, 12/31/12)

1. Generally, a party which desires a specific instruction must offer that instruction and ask that the trial court give it. The court usually has no obligation to instruct on its own motion. There are exceptions to this rule in criminal cases, because the court has the burden of seeing that the jury is instructed on the

elements of the crime, the presumption of innocence, and the burden of proof. In addition, the trial court must give adequate guidance to the jury in its evaluation of the evidence.

2. The court concluded that no error occurred in a felony murder case where the trial court failed to *sua sponte* give IPI Crim. 4th No. 7.15A, which states that a person is guilty of first degree murder where he sets forth a chain of events by committing a felony and the death in question is a direct and foreseeable consequence of that chain. In its argument on a motion for a directed verdict and on appeal, the defense claimed that there was an intervening cause of death - the refusal of the decedent, a Christian Scientist, to consent to a blood transfusion that doctors said was necessary to save his life. Defendant did not make that claim before the jury, however, claiming instead that the evidence did not show that he had perpetrated the injuries to the decedent. Defendant also did not ask the trial court to give IPI Crim. 4th No. 7.15A.

The court found that the trial court adequately instructed the jury concerning the presumption of innocence, the burden of proof, and the elements of the offense. Furthermore, the causation instruction of IPI Crim. 4th No. 7.15A is not an essential element of felony murder, and is given only when causation is at issue. In addition, the trial court gave IPI Crim. 4th No. 7.15, which is not as "specialized" as No. 7.15A but which states that the prosecution has the burden to prove that the defendant's acts were a contributing cause of the death and that death did not result from a cause unconnected to the defendant. Where the defense failed to claim before the jury that the decedent's refusal of a blood transfusion was an unforeseeable intervening cause sufficient to relieve the defendant from liability for the death, the court found that the instructions that were given provided sufficient direction to the jury to apply the law and evaluate the evidence.

The court stated, however, that had defense counsel's theory of the case been that the refusal to undergo a blood transfusion was an unforeseeable, intervening cause, the trial court might have been required to give IPI Crim. 4th No. 7.15A in support of that theory.

Defendant's conviction for felony murder was affirmed.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Ware, 2014 IL App (1st) 120485 (No. 1-12-0485, 3/14/14)

The State charged defendant with armed robbery while armed with a firearm, but the jury was incorrectly instructed that the charge was armed robbery while armed with a dangerous weapon. Although this was error, it was not reversible under the second prong of the plain-error doctrine.

Errors under the second prong are presumptively prejudicial and require automatic reversal only if they are structural, i.e., systemic errors that serve to erode the integrity of the judicial process and undermine the fairness of the trial. A jury instruction error is plain error only when it creates a serious risk the jurors incorrectly convicted defendant because they did not understand the applicable law.

The instructions here misdescribed an element of the offense by referring to a "dangerous weapon," rather than a "firearm." But a firearm is still a class of dangerous weapon, and the jury's verdict, based on substantial evidence that defendant carried a firearm, implicitly found that defendant was armed with a firearm. The error thus did not create a substantial risk that the jurors incorrectly convicted defendant because they did not understand the applicable law.

The conviction was affirmed.

(Defendant was represented by Assistant Defender Kathleen Hill, Chicago.)

People v. Watt, 2013 IL App (2d) 120183 (No. 2-12-0183, 11/21/13)

Jury instructions are intended to guide the jury and to assist in its deliberations and in reaching a proper verdict. In a criminal case, if the court determines that the jury should be instructed on a given subject and the IPI instructions contain an applicable instruction, the IPI instruction shall be given unless the court determines that it does not accurately state the law. Supreme Court Rule 451(a). Whether jury instructions accurately conveyed the applicable law is reviewed *de novo*.

Defendant was charged with armed robbery committed with a firearm. Armed robbery committed with a firearm and armed robbery committed with a dangerous weapon other than a firearm are substantively

different offenses. It was error for the court to instruct the jury that it could convict defendant of armed robbery based on his being armed with a dangerous weapon, where armed robbery with a dangerous weapon no longer exists under the current statute. Although the instruction was authorized by IPI, it does not correctly state the law and should no longer be given. The instructions should be modified to reflect the current state the law.

The Appellate Court affirmed, finding that the error did not amount to plain error.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

Top

§32-8(b)
Burden of Proof; Presumption of Innocence

Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978) The trial court's refusal to give a tendered instruction on the presumption of innocence violated defendant's right to a fair trial. Instructing the jury that the prosecution bears the burden of proof beyond a reasonable doubt is not a sufficient substitute for a presumption of innocence instruction. See also, **Kentucky v. Whorton**, 441 U.S. 786, 99 S.Ct. 2088, 60 L.Ed.2d 640 (1979), where the failure to give a presumption of innocence instruction did not, in and of itself, violate the Constitution. Such a failure must be evaluated in light of the totality of the circumstances - all the instructions given, the arguments of counsel and the weight of the evidence.

Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985) At defendant's trial the jury was instructed that "[t]he acts of a person of sound mind are presumed to be the product of the person's will, but the presumption may be rebutted," and that "a person of sound mind is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted." These instructions violated the due process requirement that the State prove every element of the offense, since a reasonable juror could have understood the instructions as creating a mandatory presumption that shifted to the defendant the burden of persuasion on the element of intent. See also, **Sandstrom v. Montana**, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); **Koehler v. Engle**, 466 U.S. 1, 104 S.Ct. 1673, 80 L.Ed.2d 1 (1984).

Carella v. California, 491 U.S. 263, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989) The jury was instructed that a person shall be presumed to have embezzled a vehicle that he fails to return within five days of the expiration of the rental agreement. The jury was also instructed that intent to commit theft by fraud is presumed from the failure to return rental property within 20 days of a demand. The instructions violated due process under **Sandstrom v. Montana**. The instructions gave "mandatory directions" which foreclosed independent jury consideration of whether the facts proved the elements of the offenses, and relieved the State of its burden of proof.

Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1991) When determining whether an instruction is unconstitutional, the reviewing court must consider the instruction as it could have been interpreted by a reasonable jury. Here, due process was violated by an instruction which equated "reasonable doubt" with "grave uncertainty" and "actual substantial doubt," and also defined "reasonable doubt" in terms of a "moral certainty," because the instruction could have misled reasonable jurors about the degree of doubt required for acquittal.

Victor v. Nebraska & Sandoval v. California, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) Two defendants challenged their convictions on the ground that their juries had been given improper instructions defining reasonable doubt. The Supreme Court held that neither instruction violated due process. Although

the reasonable doubt standard is a component of due process and the instructions as a whole must convey the concept of reasonable doubt to the jury, the Constitution neither requires nor prohibits an instruction defining reasonable doubt. Therefore, such an instruction violates due process only if there was a reasonable likelihood that the jury understood it to allow a conviction on evidence insufficient to establish guilt beyond a reasonable doubt. Although the instructions here used archaic phases such as "moral evidence" and "moral certainty," those phrases were defined in terms of the evidence introduced in the case and the need for "near certitude," an "abiding conviction of guilt," and the degree of certainty that would cause a reasonable person to act in a grave matter. Considering these definitions, it is unlikely that the jury would have interpreted the phrases inconsistently with the reasonable doubt standard.

People v. Casillas, 195 Ill.2d 461, 749 N.E.2d 864 (2000) A written instruction informing the jury of the presumption of innocence and the State's burden of proof is a "time-honored and effective method of protecting a defendant's right to a fair trial, which is guaranteed by the due process clause of the Fourteenth Amendment." The trial court has the burden of seeing that the jury is instructed on the presumption of innocence and the State's burden of proof but the failure to give such an instruction does not necessarily compel a finding that the defendant was denied due process and a fair trial. Here, the Supreme Court concluded that due process was satisfied, despite the absence of a written instruction, where the trial judge verbally instructed the venire of the presumption of innocence and burden of proof, repeated such instructions at various points during the trial, and gave an elements instruction indicating that defendant could be convicted only if all of the propositions had been proven beyond a reasonable doubt. In addition, the burden of proof and presumption of innocence were discussed during closing arguments, and the evidence of guilt was overwhelming.

People v. Layhew, 139 Ill.2d 476, 564 N.E.2d 1232 (1990) The Appellate Court reversed because the jury was not given a written instruction on the presumption of innocence or the burden of proof . The Court did not examine the totality of the circumstances to determine whether defendant received a fair trial in the absence of the above instruction, but instead issued a "directive" that the failure to give the above instruction will result in reversal. The Supreme Court reversed, however, holding that the failure to give the jury a written instruction on the presumption of innocence and burden of proof is not automatically reversible error; the reviewing court must look to the totality of the circumstances to determine whether defendant received a fair trial. Here, the jury was "adequately informed" about the presumption of innocence and burden of proof "where the trial court provided an extensive dissertation on these principles before the trial started. . . . and these concepts were repeated during the trial and included within three jury instructions."

People v. Cagle, 41 Ill.2d 528, 244 N.E.2d 200 (1969) The concept of reasonable doubt needs no definition, and the giving of an instruction defining it is error. See also, **People v. Failor**, 271 Ill.App.3d 968, 649 N.E.2d 1342 (4th Dist. 1995).

People v. Housby, 84 Ill.2d 415, 420 N.E.2d 151 (1981) At defendant's trial for burglary, the jury was given the IPI instruction on possession of recently stolen property ("[i]f you find that the defendant had exclusive possession of recently stolen property, and there was no reasonable explanation of his possession, you may infer that the defendant obtained possession of the property by burglary"). The Supreme Court upheld the use of this instruction.

People v. Harper, 36 Ill.2d 398, 223 N.E.2d 841 (1967) It is improper to instruct the jury that attempt escape from custody raises a "presumption of guilt" of the crime charged.

People v. Dodd, 173 Ill.App.3d 460, 527 N.E.2d 1079 (2d Dist. 1988) At the defendant's trial for retail theft, the following instruction was given:

> "If any person removes merchandise beyond the last known station for receiving payment for the merchandise in that retail mercantile establishment, such person shall be presumed to have possessed, carried away or transferred such merchandise with intention of retaining it or with the intention of depriving the merchant permanently of the possession, use or benefit of such merchandise without paying the full retail value of such merchandise."

The Appellate Court followed **People v. Flowers**, 134 Ill.App.3d 324, 480 N.E.2d 198 (4th Dist. 1985), and held that the above instruction is unconstitutional:

> "We believe, as did the **Flowers** court, that possession with intent to permanently deprive a merchant of possession of merchandise without paying its full retail value does not necessarily flow beyond a reasonable doubt from the predicate fact of removing merchandise beyond the last known station for payment. We agree that 'it is not completely unreasonable to hypothesize a person carrying an item of merchandise past the last payment station, without paying for it, due to inadvertence or thoughtlessness and not due to an intention of retaining it without paying its full retail value.' We thus conclude that the instruction's mandatory presumption is constitutionally infirm."

People v. Cage, 146 Ill.App.3d 726, 497 N.E.2d 386 (1st Dist. 1986) The Court reversed because the jury was not given written instructions on the presumption of innocence and the burden of proof. The instructions were not requested by the defendant, but "the trial court bears the burden on its own motion of seeing that the jury is instructed [regarding these basic protections.]" The Court held that the trial judge's statement during *voir dire* (that the defendant was innocent until the State proved him guilty beyond a reasonable doubt) was not sufficient to properly instruct the jury. Since the trial judge also told the jury during *voir dire* that the applicable law would be stated in the instructions, this "counteracted" the trial court's explanation.

People v. Ayala, 142 Ill.App.3d 93, 491 N.E.2d 154 (1st Dist. 1986) Defendants contended that reversible error occurred where the trial judge failed, *sua sponte*, to give the jury an instruction on the presumption of innocence and the burden of proof. The Court applied the test set out in **Kentucky v. Whorton**, 441 U.S. 786 (1979), and concluded that under the totality of circumstances the defendants received a fair trial. The Court noted that during *voir dire*, the principles of presumption of innocence and reasonable doubt were "outlined and explained." The jurors were questioned about the State's burden of proof, and all jurors were present. "Thus, the jurors heard the questions about fairness and burden of proof numerous times." The Court also noted that in his closing argument defense counsel "repeatedly emphasized" the presumption of innocence and the requirement of proof beyond a reasonable doubt. In addition, the verdict "finds ample support in the record since it was based on the testimony of an eyewitness to the crime."The Court concluded that although the "written presumption of innocence and burden of proof instruction should have been tendered to the jury, we conclude that its omission did not deny defendants a constitutionally fair trial."

People v. Grant, 101 Ill.App.3d 43, 427 N.E.2d 810 (1st Dist. 1981) At defendant's trial the jury was not instructed that the State must prove one of the mental states set forth in the Criminal Code The Appellate Court held that a trial judge "bears the burden of seeing that the jury is instructed on the elements of the crime charged, on the presumption of innocence and on the question of burden of proof." Here, because the instructions failed to include an essential element (mental state) of the crimes charged, the convictions must be reversed.

People v. Downs, 2015 IL 117934 (No. 117934, 6/18/15)

1. The Federal Constitution does not require or prohibit a jury instruction defining reasonable doubt. A reasonable doubt instruction violates due process only if there is a reasonable likelihood that the jurors understood the instruction to allow conviction upon proof that is less than beyond a reasonable doubt.

Illinois, like some other jurisdictions, does not define reasonable doubt. The rationale behind this rule is that "reasonable doubt" is self-defining and needs no amplification. Thus, not only is there no IPI definition of "reasonable doubt," the Committee Notes state that no instruction should be given. IPI Criminal 4th No. 2.05, Committee Note.

2. During deliberations, the jury asked, "What is your definition of reasonable doubt, 80%, 70%, 60%?" The court concluded that the trial judge did not err by responding, "We cannot give you a definition[;] it is your duty to define." The court concluded that this answer was "unquestionably correct" in light of Illinois precedent that the jury should not be given a definition of reasonable doubt.

The court rejected the argument that error occurred in the context of this case because in view of the jury's reference to percentages ranging from 60 - 80%, the failure to provide a definition allowed the jury to use a standard that was less than reasonable doubt. The court noted the difficulty of giving a cogent definition of "reasonable doubt," and held that in its view "it is better to refrain" from giving a definition at all. The court also noted that defense counsel did not object to the trial court's response and that had error occurred the issue could only be reached as plain error.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Cacini, 2015 IL App (1st) 130135 (No. 1-13-0135 & 1-13-3166, 12/11/15)

Defendant was convicted, in a jury trial, of attempt first degree murder and aggravated battery. The trial court concluded that the evidence was sufficient to warrant giving self-defense instructions, and gave IPI Criminal 4th No. 24-25.06, which provides the general definition of self-defense. However, the trial judge failed to also give IPI Criminal 4th No. 24-25.06A, which informs the jury as the final proposition in the issues instructions that the State bears the burden of proving beyond a reasonable doubt that defendant lacked justification to use force in self-defense. The Committee Note to IPI Criminal 4th No. 24-25.06 instructs the trial court to give both to give both No. 24-25.06 and No. 24-25.06A when instructing on self-defense.

As a matter of plain error under the second prong of the plain error rule, the Appellate Court reversed and remanded for a new trial.

1. Once the defense properly raises the affirmative defense of self-defense, the State bears the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense. The jury must be instructed as to the affirmative defense and the State's corresponding burden of proof. IPI Criminal 4th Nos. 24-25.06 and 24-25.06A fulfill this requirement. Supreme Court Rule 451(a) requires the trial court to use the Illinois Pattern Jury Instructions, Criminal, related to a subject when the court determines that the jury should be instructed on the subject.

2. Supreme Court Rule 451(c) provides that if the interests of justice so require, substantial defects in criminal jury instructions are not waived by the failure to make timely objections. The purpose of Rule 451(c) is to permit the correction of grave errors and errors in cases that are so factually close that fundamental fairness requires that the jury be properly instructed. Rule 451(c) is coextensive with the plain-error clause of Illinois Supreme Court Rule 651(a).

Under the plain-error doctrine, "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded" unless the appellant demonstrates plain error. The plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process.

3. Although defense counsel failed to tender IPI Criminal 4th No. 24-25.06A, failed to timely object to the absence of the instruction, and failed to include the issue in his posttrial motion, the Appellate Court concluded that the trial judge's failure to give No. 24-25.06A constituted plain error. The court concluded that the omission of a burden of proof instruction may have caused the jury to believe that defendant had to prove that he acted in self-defense, especially since neither party's closing argument clarified the burden of proof and the State's closing argument could easily have been misinterpreted.

Defendant's convictions for attempt first degree murder and aggravated battery were reversed and the cause remanded for a new trial.

People v. Downs, 2014 IL App (2d) 121156 (No. 2-12-1156, 5/30/14)

1. It is well-established that the term "reasonable doubt" is self-defining and needs no further definition in jury instructions. The Illinois Pattern Jury Instructions recommend that the jury should be given no instruction defining reasonable doubt. Illinois Pattern Jury Instructions, Criminal, No. 2.05, Committee Note, at 78. Accordingly, it is error to give the jury an erroneous definition of reasonable doubt.

The trial court erred in responding to a jury note asking "[W]hat is your definition of reasonable doubt, 80%, 70%, 60%?" by instructing the jury that "[W]e cannot give you a definition it is your duty to define." This instruction had two problems. First, it improperly told the jury that it could collectively determine the meaning of reasonable doubt. And, second, it created a danger that the jury convicted on proof that did not meet the reasonable doubt standard. This second danger was particularly manifest in this case because the jury's question equated reasonable doubt with "disturbingly low" percentages.

2. Although defendant failed to properly preserve this error, and indeed only raised it for the first time on the appeal of an earlier remand to the trial court for a **Krankel** hearing, the Appellate Court addressed the issue under the second prong of plain error.

The plain-error doctrine allows a forfeited claim to be reviewed under two circumstances: (1) where a clear and obvious error occurred and the evidence is so closely balanced that the error threatened to tip the scales of justice against the defendant, regardless of the error's seriousness; or (2) when a clear and obvious error occurred and it was so serious that if affected the fairness of trial and challenged the integrity of the judicial process. Clear and obvious means that the law is well-settled at the time of trial. Plain error is not intended as a general savings clause, but is construed as a narrow and limited exception to forfeiture.

The second prong of plain error is equated with structural error. Structural error is a systemic error the erodes the integrity of the judicial process and undermines the fairness of trial. Structural error requires automatic reversal. Structural error is tightly circumscribed, and has only been recognized in a limited number of cases, such as the complete denial of counsel, trial before a biased judge, denial of self-representation, denial of a public trial, and a defective reasonable-doubt instruction.

Because an erroneous reasonable doubt instruction has long been held to constitute structural error and to satisfy the second prong of the plain-error analysis, defendant's conviction was reversed.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Gashi, 2015 IL App (3d) 130064 (No. 3-13-0064, 4/7/15)

Trial courts should not attempt to define reasonable doubt for the jury. The concept of reasonable doubt is self-explanatory and needs no further explanation. Providing a definition of reasonable doubt is more likely to confuse a jury than clarify its meaning.

Noting a split among the Illinois Appellate Courts on this issue, the Appellate Court held here that it was structural error under the second prong of plain error for the trial court to tell the jury during *voir dire* that there is no definition of reasonable doubt, so "that is for you [the jury] to decide." Such a statement implies a broad range of meanings for the concept of reasonable doubt, and it is reasonably likely that the jury would overestimate the latitude it had in defining reasonable doubt.

The dissent did not believe that the trial court's comments were erroneous. Nothing in the court's comments created a reasonable likelihood that the jury believed it could convict on anything less than

reasonable doubt.

(Defendant was represented by Assistant Defender Mario Kladis, Ottawa.)

People v. Thomas, 2014 IL App (2d) 121203 (No. 2-12-1203, 8/5/14)

The failure to correctly instruct the jury on the State's burden to prove defendant guilty beyond a reasonable doubt is a violation of due process. The proper inquiry is not whether the jury could have applied a particular instruction in an unconstitutional manner, but whether there is a reasonable likelihood that the jury actually applied the instruction improperly.

The United States Supreme Court has held that as a matter of federal constitutional law a trial court is neither prohibited from nor required to define reasonable doubt. Under Illinois law, however, courts are discouraged from defining reasonable doubt for a jury. There is no recommended jury instruction providing such a definition, and the committee notes recommend that courts give no instruction defining the term.

But defining reasonable doubt does not necessarily constitute reversible error. Instead, the question is whether the instructions taken as a whole created a reasonable likelihood that the jury believed it could convict under a lesser standard than reasonable doubt.

Here, the trial court answered the jurors' request for the legal definition of reasonable doubt by telling them that "it is for you to decide." The Appellate Court held that this response was "unquestionably correct." The court did not attempt to define reasonable doubt for the jury. Instead, it left the jurors to wrestle with its meaning themselves, which is in keeping with our legal system's confidence that jurors will act diligently and thoughtfully in applying the law. "[A]bsent any concrete demonstration of error or confusion, jurors should be trusted to apply the reasonable doubt standard appropriately."

The court disagreed with the decisions in **People v. Thurman**, 2011 IL App (1st) 0911019 and **People v. Franklin**, 2012 IL App (3d) 100618, to the extent that they held that simply instructing jurors that they must determine for themselves the meaning of reasonable doubt is *per se* reversible error.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

People v. Velez, 2012 IL App (1st) 101325 (No. 1-10-1325, 3/22/12)

A permissive presumption permits but does not require a jury to find that one fact is proved by the existence of another fact. A permissive presumption does not violate due process where: (1) there is a rational connection between the basic fact and the presumed fact; (2) the presumed fact more likely than not flows from the basic fact; and (3) the inference is supported by corroborating evidence of guilt.

Defendant was charged with child abduction by luring or attempting to lure a child under the age of 16 into a motor vehicle for other than a lawful purpose. 720 ILCS 5/10-5(b)(10). The jury was instructed in conformity with IPI Criminal 4th No 8.11A: "If you find that the defendant lured, or attempted to lure a child under 16 years of age into a motor vehicle, and that he did so without the consent of a parent or lawful custodian, you may infer it was for other than a lawful purpose. You are never required to make this inference. It is for the jury to determine whether the inference should be made. You should consider all of the evidence in determining whether to make this inference."

Allowing the jury to infer that defendant acted with other than a lawful purpose from the fact that he attempted to lure a 14-year-old girl into his van did not violate due process. There is a rational connection between the proved fact and the presumed fact. Defendant used words and gestures designed to direct the girl to enter his van. She felt fearful, tried to ignore him, and increased her pace in order to escape from him. Defendant called her "baby girl" and drove alongside her. The absence of evidence that defendant touched, harmed, or threatened her did not eliminate the rational connection between the proved and presumed fact. There is no requirement that defendant actually touch or harm the child to be guilty of child abduction. It is more likely than not that defendant lured the child for an unlawful purpose. The inference was supported by evidence that defendant left when the girl told him she saw her mother, tried to change his appearance later that day, and denied to the police that he had any interaction with the girl, all of which demonstrated his

consciousness of guilt.

(Defendant was represented by Assistant Defender Sarah Curry, Chicago.)

People v. Walker, 2012 IL App (2d) 110288 (No. 2-11-0288, 12/31/12)

1. Generally, a party which desires a specific instruction must offer that instruction and ask that the trial court give it. The court usually has no obligation to instruct on its own motion. There are exceptions to this rule in criminal cases, because the court has the burden of seeing that the jury is instructed on the elements of the crime, the presumption of innocence, and the burden of proof. In addition, the trial court must give adequate guidance to the jury in its evaluation of the evidence.

2. The court concluded that no error occurred in a felony murder case where the trial court failed to *sua sponte* give IPI Crim. 4th No. 7.15A, which states that a person is guilty of first degree murder where he sets forth a chain of events by committing a felony and the death in question is a direct and foreseeable consequence of that chain. In its argument on a motion for a directed verdict and on appeal, the defense claimed that there was an intervening cause of death - the refusal of the decedent, a Christian Scientist, to consent to a blood transfusion that doctors said was necessary to save his life. Defendant did not make that claim before the jury, however, claiming instead that the evidence did not show that he had perpetrated the injuries to the decedent. Defendant also did not ask the trial court to give IPI Crim. 4th No. 7.15A.

The court found that the trial court adequately instructed the jury concerning the presumption of innocence, the burden of proof, and the elements of the offense. Furthermore, the causation instruction of IPI Crim. 4th No. 7.15A is not an essential element of felony murder, and is given only when causation is at issue. In addition, the trial court gave IPI Crim. 4th No. 7.15, which is not as "specialized" as No. 7.15A but which states that the prosecution has the burden to prove that the defendant's acts were a contributing cause of the death and that death did not result from a cause unconnected to the defendant. Where the defense failed to claim before the jury that the decedent's refusal of a blood transfusion was an unforeseeable intervening cause sufficient to relieve the defendant from liability for the death, the court found that the instructions that were given provided sufficient direction to the jury to apply the law and evaluate the evidence.

The court stated, however, that had defense counsel's theory of the case been that the refusal to undergo a blood transfusion was an unforeseeable, intervening cause, the trial court might have been required to give IPI Crim. 4th No. 7.15A in support of that theory.

Defendant's conviction for felony murder was affirmed.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

Top

§32-8(c)
Conflicting Instructions

People v. Jenkins, 69 Ill.2d 61, 370 N.E.2d 532 (1977) At defendant's trial for attempt murder, where the central issue was whether his use of force was justified, two directly conflicting instructions were given to the jury. The defense instruction correctly stated that defendant could be convicted only if he was not justified in using the force in question, but the State's instruction omitted any reference to that essential element. Where the instructions are contradictory, the jury cannot perform its constitutional function. It is well established that the giving of contradictory instructions on an essential element in the case is prejudicial error, and is not cured by the fact that another instruction is correct. See also, **People v. Alvine**, 173 Ill.2d 273, 671 N.E.2d 713 (1996) (conflicting instructions on murder).

People v. Stanko, 402 Ill. 558, 84 N.E.2d 839 (1949) "The law requires that the jury shall be instructed only

concerning the crime charged. The giving of an instruction defining a different offense is not cured by the presence of an accurate one, because it cannot be shown whether the jury followed the correct or the erroneous instruction." See also, **People v. English**, 287 Ill.App.3d 1043, 679 N.E.2d 494 (3d Dist. 1997).

People v. Bush, 157 Ill.2d 248, 623 N.E.2d 1361 (1993) The trial court erred by giving a non-IPI instruction that could have confused the jury about the elements of home invasion. Although non-IPI instructions may be given where the pattern instructions do not reflect the law, such instructions must be accurate, simple, brief, impartial and non-argumentative. The non-IPI instruction in this case misstated the limited-authority doctrine in that it said that consent for an entry was vitiated merely because criminal acts were subsequently committed, without regard to whether those crimes were intended at the time of the entry. In addition, it conflicted with IPI instructions concerning the elements of home invasion. The Court held that in appropriate cases the jury should be instructed that a consensual entry to a dwelling is unauthorized where the defendant, or one for whose conduct he is accountable, at the time of the entry intends to commit criminal acts once inside the dwelling.

People v. Ayers & Hoskins, 331 Ill.App.3d 742, 771 N.E.2d 1041 (1st Dist. 2002) Reversible error occurred where the court gave contradictory first and second degree murder instructions, some of which omitted the element of justifiable use of force. These instructions allowed the jury to convict defendant of first degree murder without ever considering whether he was justified in using force. Reversal is required if the jury is "presented with two self-contained, inherently contradictory and inconsistent issues instructions defining the elements requisite for a finding of guilty."

People v. Foster, 23 Ill.App.3d 559, 319 N.E.2d 522 (4th Dist. 1974) Conviction reversed because jury was given contradictory instructions on intoxication. The jury was instructed that "an intoxicated person is . . . responsible . . . unless his intoxication renders him incapable of acting intentionally," and that "a voluntary condition of drunkenness is no excuse for the commission of a crime." As a whole the instructions were misleading, confusing and incorrect.

Top

§32-8(d)
Admissions - Confessions

(**Note**: IPI 3.06-3.07, does not use the terms "admission" or "confession." The Committee Note states that "whether a statement is an admission, confession, or false exculpatory statement is a legal conclusion that ought not to be communicated to the jury.") Prior to the adoption of this instruction numerous decisions dealt with the question of whether the jury should be instructed that a defendant's statement was a "confession" or a less incriminating "admission." See **People v. Floyd**, 103 Ill.2d 541, 470 N.E.2d 293 (1984); **People v. Cook**, 33 Ill.2d 363, 211 N.E.2d 374 (1965).

Cumulative Digest Case Summaries **§32-8(d)**

People v. Turman, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-09-1019, 6/30/11)

1. The term "reasonable doubt" is self-defining and needs no further elaboration. The principle that a jury is entitled to have its legal questions answered does not include a request to have reasonable doubt defined.

After deliberating several hours, the jury asked for a "more explicit, expansive definition of reasonable doubt." With the agreement of the parties, the court responded that "reasonable doubt is not

defined under Illinois law. It is for the jury to collectively determine what reasonable doubt is."

By instructing the jury that it could collectively determine what reasonable doubt is, the court allowed the jury to use a standard that in all likelihood was below the threshold of the reasonable doubt standard. The best response for the court to have made would have been to refuse to give the jury an additional explanation.

The court found this instruction to be plain error under both prongs of the plain-error rule. A 17-year-old defendant was charged with criminal sexual assault of 19-year-old college student who had drunk excessive amounts of alcohol, on the theory that he knew that she was unable to give knowing consent to sexual acts. Faced with this difficult task, it was critical that the jury understand what standard of proof it was to utilize. Under the first prong, because of the closeness of the evidence, the clear error threatened to tip the scales of justice against the defendant. Under the second prong, the error was so serious that it affected the fairness of the defendant's trial and his right to due process, thereby challenging the integrity of the judicial process.

2. The court also found that the omission of language that it was for the jury to determine whether the defendant made the statement from an instruction regarding the jury's consideration of statement evidence (IPI Crim. 4th No. 3.06-3.07) was plain error. At trial, defendant denied making many of the statements contained in a written statement. He testified that the statement was never reread to him even though he signed each page of the statement, and asserted that he did not even know the definition of a word attributed to him in the statement. There was evidence supporting his denial as the grammar and language used by defendant in a note he wrote to the complainant was at odds with the language the prosecution claimed defendant used in the statement. Given the importance of the statement to the State's case and the closely-balanced nature of the evidence, the error "threatened to tip the scales of justice away from the defendant." It also satisfied the second prong of the plain-error rule as it "deprived the defendant of a fair trial and impacted the integrity of the judicial process.

This error was not cured by a separate instruction on the jury's consideration of prior inconsistent statement evidence (IPI Crim. 4th No. 3.11) that informed the jury that it was for the jury to determine if the "witness made the earlier [inconsistent] statement" because it was unclear which instruction the jury chose to follow.

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

Top

§32-8(e)
Affirmative Defenses

People v. Bratcher, 63 Ill.2d 534, 349 N.E.2d 31 (1976) A defendant is entitled to the benefit of any defense shown by the entire evidence, even if the facts on which such defense is based are inconsistent with the defendant's own testimony. "[V]ery slight" evidence upon a given theory of a case will justify an instruction.

People v. Poe, 48 Ill.2d 506, 272 N.E.2d 28 (1971) Alibi is not an affirmative defense, and no instruction on alibi need be given.

Chicago v. Mayer, 56 Ill.2d 366, 308 N.E.2d 601 (1974) Defendant claimed that his conduct was necessary to protect an injured person during a demonstration. He was found guilty of disorderly conduct and interfering with a police officer. The trial court denied defendant's instruction because defendant was not a "reasonable man," but a medical student. The Supreme Court held that a "necessity defense must be viewed in light of the factual situation of the particular case which might include a defendant in a peculiar position

to reasonably believe or anticipate an injury not apparent to someone who lacks similar knowledge, information or training." Reversed and remanded.

People v. Huckstead, 91 Ill.2d 536, 440 N.E.2d 1248 (1982) The defendant was charged with murder, and presented the defense of self-defense. The jury was instructed on the presumption of innocence, the elements of murder and justified use of force. However, the defendant did not tender, and the judge did not give *sua sponte*, an instruction, which included justified use of force in the elements of the offense. In his post-trial motion, defendant did not urge the failure to give the above instruction as error. The Supreme Court held that defendant waived his claim. The Court also refused to consider the issue as plain error — the evidence was not factually close, and the instructions that were given were not conflicting. In addition, the instructions which were given, coupled with the closing arguments by both sides, apprised the jury that the State had the burden of proving that defendant was not justified in the force he used.

People v. Berry, 99 Ill.2d 499, 460 N.E.2d 742 (1984) At defendant's trial for murder, he raised the defense of self-defense. The jury was given appropriate definitional instructions, including one on justified use of force, but was not given an instruction which includes as an element the requirement that the State prove beyond a reasonable doubt that defendant was not justified in using the force he used. The Supreme Court held that the failure to instruct the jury properly was plain and reversible error. The Court distinguished **People v. Huckstead**, 91 Ill.2d 536, 440 N.E.2d 1248 (1982), in which the jury was told of the State's burden in regard to self-defense by both the defense counsel and the prosecutor in closing argument; thus, the jury was sufficiently informed. Here, however, the jury was not apprised of the State's burden in regard to self-defense. "Grave error resulted," because the evidence in this case was "factually close."

People v. Unger, 66 Ill.2d 333, 362 N.E.2d 319 (1977) Defendant, who was on trial for escape, sufficiently raised the defense of necessity by testifying that he left the prison honor farm to save his life after being subjected to a death threat and threats of forced homosexual activity. Although the State's evidence cast doubt on the defendant's motives for escape, defendant was entitled to have the jury consider the defense on the basis of his testimony.

People v. Kite, 153 Ill.2d 40, 605 N.E.2d 563 (1992) Defendant, a Menard inmate, was convicted of unlawful possession of a weapon by a person in custody of a DOC facility. The Appellate Court reversed because the trial judge refused to instruct the jury on necessity. The Supreme Court reinstated the conviction, finding that there was insufficient evidence to justify a necessity instruction. Several factors are to be considered in determining whether an inmate is entitled to a necessity instruction in a weapon case: whether the inmate received a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future; whether there was time to complain to authorities or a history of having made futile complaints; and whether defendant had the time and opportunity to resort to the court system. Although the latter two factors are not necessary in every case, the defendant must always show a specific and immediate threat.

People v. Crane, 145 Ill.2d 520, 585 N.E.2d 99 (1991) The defendant was charged with murder for beating and burning the victim and thereby causing his death. In regard to the beating defendant claimed he acted in self-defense. In regard to the burning (pouring gasoline over the victim and setting him on fire), he claimed that he believed the victim was already dead. The trial judge instructed the jury on self-defense but refused to give an instruction on mistake of fact. The Supreme Court held that it was reversible error to refuse the mistake of fact instruction. The defense was supported by the evidence: two police officers testified that defendant told them he believed the victim was dead prior to the burning, the expert witnesses were unable to conclusively determine whether the victim was alive at the time of the burning, and one expert testified that a lay person seeing an unconscious body with the victim's injuries might reasonably conclude he was dead. A mistake of fact is a valid defense if it negates a mental state that is an element of the offense. Here, the

mistake of fact, if believed by the jury, would have negated the mental state required for murder.

People v. Haywood, 83 Ill.2d 540, 413 N.E.2d 410 (1980) After defendant raised an intoxication defense the State was allowed, over objection, to give two instructions on intoxication. One of the instructions was IPI but the other was a non-IPI which stated that defendant's intoxication is a defense "only if [it] is so extreme as to suspend entirely his power of reason, rendering him incapable of any mental action." The Court held that giving the above non-IPI instruction was reversible error. The "use of additional instructions on a subject already covered by IPI would defeat the goal that all instructions be simple, brief, impartial and free from argument." Here, the non-IPI instruction served " to confuse the jury," which could have construed this instruction as requiring defendant to be devoid of any mental activity whatsoever.

People v. Pegram, 124 Ill.2d 166, 529 N.E.2d 506 (1988) The victim went to his restaurant and bar about 5 a.m. to count the previous night's receipts. Shortly thereafter the defendant, who assisted the restaurant porter, knocked on the door and was admitted by the victim. The victim returned to the office, and defendant began his cleaning chores by taking trash to the rear of the building. When he unlocked the back gate, two masked men with guns entered, pointed a gun at his head and said defendant's brains would be blown out unless he did what they said. The defendant further testified that he did not know either of the masked men. Other evidence tended to show that the defendant may have been acting in concert with the masked men as they robbed the victim. The Supreme Court held that the jury should have been instructed on the defense of compulsion because the defendant's testimony constituted "some evidence" sufficient to raise the defense. The Court concluded that defense counsel's failure to tender an instruction on the defense of compulsion, and on the State's burden of proof for that defense, denied defendant effective assistance of counsel.

People v. Harris, 39 Ill.App.3d 805, 350 N.E.2d 850 (4th Dist. 1976) Trial court erred by failing to give the "justifiable use of force in self-defense" instruction tendered by the defense. Defendant testified that on earlier occasions, the deceased had acted as if he had a gun. In addition, a few minutes before the shooting defendant saw the deceased put a gun in his pocket. The deceased was reaching for his pocket when defendant fired. The Court held that this testimony, if believed, would support a finding of reasonable belief that the use of deadly force was justifiable despite the fact that no gun was found on the deceased. Although defendant's testimony was contradicted by other evidence, the conflict was a matter for the jury to resolve.

People v. Dwight, 368 Ill.App.3d 873, 859 N.E.2d 189 (1st Dist. 2006) The trial court abused its discretion by refusing to give an insanity instruction.

People v. Luckett, 339 Ill.App.3d 93, 790 N.E.2d 865 (1st Dist. 2003) The Appellate Court reiterated its prior holdings that: (1) a second degree murder instruction must be given whenever the evidence justifies a self-defense instruction in a first degree murder case, and (2) second degree murder instructions should be given where the evidence is conflicting and would support findings that the defendant committed intentional murder, felony murder or second degree murder. The court found that **People v. Morgan**, 197 Ill.2d 404, 758 N.E.2d 813 (2001) does not preclude second degree murder instructions where the evidence would permit the jury to convict on knowing or intentional murder, although the State also requests felony murder instructions and second degree murder cannot be based on a felony murder theory. Because the evidence conflicted as to whether defendant committed felony murder or knowing and intentional murder, and would have allowed the jury to convict of second degree murder based on an unreasonable belief in self-defense concerning the latter theory, defendant was entitled to second degree murder instructions on the charge alleging knowing or intentional murder.

People v. Sims, 374 Ill.App.3d 427, 871 N.E.2d 153 (3d Dist. 2007) An arresting officer may use force reasonably necessary to effect an arrest, and need not retreat in the face of resistence. An arrestee has no right

to use force to resist an arrest by a known police officer, even if the arrest is unlawful, unless the officer uses excessive force. However, an officer's use of excessive force to conduct an arrest authorizes the use of self-defense on the part of arrestee. The trial judge erred by refusing to give a self-defense instruction where the defendant was charged with battery and resisting a peace officer for struggling with arresting officers and kicking one officer.

People v. Rollins, 295 Ill.App.3d 412, 695 N.E.2d 61 (5th Dist. 1998) Defendant argued that he was entitled to a "mistake of fact" instruction at his murder trial because if the jury believed that the death was caused by drowning, it might have found that defendant lacked the intent to kill because he thought the decedent was already dead when he placed her in the water. In support, defendant cited **People v. Crane**, 145 Ill.2d 520, 585 N.E.2d 99 (1991), which held that the defendant was entitled to a "mistake of fact" instruction where he beat the decedent in self-defense and then burned the body in the mistaken belief that death had already occurred. The Appellate Court held that in **Crane**, the critical consideration was that the actions which injured the decedent were justified. Here, by contrast, defendant's beating of the decedent was not justified. The "mistake of fact" defense is unavailable where the injuries which lead to a mistaken conclusion that death has occurred were inflicted without justification.

People v. Gonzalez, 385 Ill.App.3d 15, 895 N.E.2d 982 (1st Dist. 2008) Even very slight evidence justifies an instruction on the defense theory of the case. Under 720 ILCS 5/5-12-16(d), a reasonable belief that the victim was 17 years old or older is an affirmative defense to aggravated criminal sexual abuse. Once the "reasonable belief" affirmative defense is raised, the State has the burden of proving the defendant guilty beyond a reasonable doubt concerning the defense, as well as on all other elements of the offense. The Committee Note to IPI Crim. No. 4th 11.62(A) provides that where the "reasonable belief" defense is raised, the parties must add a fourth proposition to IPI Crim. 4th 11.62(A) to inform the jury that the State has the burden to disprove the defense. In addition, IPI Crim. 4th 4.13, which defines "reasonable belief," should be given. The failure of the trial court to instruct the jury concerning the State's burden of proof and the definition of "reasonable belief" constituted serious error which required reversal, despite the fact that the court informed the jury of the affirmative defense itself.

People v. Rodriguez, 387 Ill.App.3d 812, 901 N.E.2d 927 (1st Dist. 2008) IPI Crim. No. 3.15 lists five factors to be considered in evaluating eyewitness identifications, including the witness's "level of certainty" when confronting the defendant. The court rejected the argument that because social science research has shown that witness certainty does not increase reliability, the trial court should have omitted the above factor from the version of IPI Crim. No. 3.15 given to the jury. The authority to develop pattern instructions is given to the IPI Committee; a trial judge may decline to use an IPI instruction only if the instruction does not accurately reflect the law or is unsupported by the evidence. Thus, the trial court lacks authority to void an IPI instruction which accurately reflects State law. The court noted, however, that a defendant is free to introduce social science research indicating that a factor in IPI Crim. No. 3.15 is inapplicable to a particular case, and that the trial court would then have authority to modify the instruction in that case.

People v. Lyda, 190 Ill.App.3d 540, 546 N.E.2d 29 (2d Dist. 1989) The Court found that at a trial for resisting an officer, the trial judge erred by refusing the defendant's tendered instruction on the affirmative defense of justifiable use of force in defense of another. The defendant forcibly tried to get past a police officer to assist his brother, who was being arrested. The defendant became agitated when the officers used "forceful measures" to retain his brother. An officer acknowledged that the brother was taken to the hospital because of abrasions to his wrists and ankles. This evidence may have given defendant cause to believe that excessive force was being used. Thus, it was for the jury to determine whether defendant had a reasonable belief that his conduct was necessary to protect his brother from excessive force.

People v. Swartz, 186 Ill.App.3d 399, 542 N.E.2d 515 (4th Dist. 1989) Where the defendant's theory was that he was justified in using force because he had reason to believe complainant was wrongfully interfering with the lawful possession of his automobile, and both parties testified that the complainant's hair was grabbed after she took the defendant's keys and attempted to leave the car, the evidence was sufficient to support the defense of justified use of force in defense of property.

People v. Gracey, 104 Ill.App.3d 133, 432 N.E.2d 1159 (5th Dist. 1982) The trial court erred where, as a sanction for defendant's failure to comply with discovery, it refused to instruct the jury on the defenses of intoxication and self-defense.

People v. Rodriguez, 96 Ill.App.3d 431, 421 N.E.2d 323 (1st Dist. 1981) The trial judge erred by refusing to give defendant's tendered instruction on justifiable use of force. The complainant and a disinterested witness testified that the beating was inflicted without any provocation, but a defense witness testified that the complainant attacked the defendant with a tire iron. Although the jury "would not be likely to accept the defense version of the events . . . the credibility of the witnesses can only be resolved by the jury, not the trial court." Thus, defendant was entitled to an instruction on his theory of defense "even if the trial judge believed that the evidence offered in support of that defense was inconsistent or of doubtful credibility."

People v. Ellison, 126 Ill.App.3d 985, 466 N.E.2d 1024 (2d Dist. 1984) Defendant was convicted of burglary and theft based on his possession of stolen property. The defendant contended that the trial court erred by refusing his tendered non-IPI instruction based on the statutory defense of ignorance or mistake. The Appellate Court held that the defendant presented evidence in support of his lack of knowledge (his own testimony and an expert opinion as to his mental capacity). Thus, he was entitled to have the jury instructed on this theory of defense. Additionally, the tendered instruction, though non-IPI, was "simple, brief, impartial and free from argument, as required by Supreme Court Rule 451(a)."

People v. Nugin, 99 Ill.App.3d 693, 425 N.E.2d 1163 (1st Dist. 1981) The defendant raised the defense of compulsion. The jury was instructed that to support a finding of guilty the State must prove: "That the defendant or one for whose conduct the defendant is responsible did not act under compulsion." The above instruction was erroneous because it told the jury that the State need only prove one of two alternatives — that defendant did not act under compulsion or that one for whose conduct he was responsible did not act under compulsion. This was misleading in that it "deceptively implied that even if defendant were acting under compulsion, he could nonetheless be held responsible for the criminal acts of another."

People v. Newbolds, 204 Ill.App.3d 952, 562 N.E.2d 1051 (5th Dist. 1990) The defendant was charged with aggravated battery and unlawful use of weapons by a felon. Following a jury trial, he was convicted of the weapons offense and acquitted of aggravated battery. The Appellate Court held that the defendant was deprived of a fair trial because the jury was not instructed on the defense of necessity. The charges were based on an incident in which defendant's girlfriend, the complainant, was shot. The complainant gave three versions of the incident. The third version, given about three months after the incident, was that she pulled the gun out of her purse to scare defendant when he started arguing with her. Defendant reached for the gun to take it away, and it accidentally discharged while the complainant's finger was on the trigger. The Court stated that the complainant's third version of the incident constituted some evidence that defendant acted out of necessity to prevent immediate and substantial bodily harm to himself.

People v. Fernandez, 240 Ill.App.3d 518, 608 N.E.2d 487 (1st Dist. 1992) Conviction for delivery of a controlled substance reversed where the court gave one IPI instruction defining entrapment, but failed to give a second instruction stating that the prosecution has the burden of proving the absence of entrapment. By failing to instruct on the State's burden, the trial judge removed from the jury's consideration a disputed issue

which was essential to determining guilt or innocence.

People v. Hobbs, 249 Ill.App.3d 679, 619 N.E.2d 258 (5th Dist. 1993) The jury was instructed that a person who was attempting or committing a forcible felony at the time of the offense could not raise self-defense. "Forcible felony" was defined as "burglary, robbery, aggravated battery, or any felony which involves the use or threat of physical force or violence against any individual." A new trial was required because the instructions may have deprived the defendant of an affirmative defense. Where the jury is told that commission of a particular offense will bar a claim of self-defense, the elements of that offense must also be defined. In addition, the instruction did not refer to home invasion, the only charge against the defendant which could have been deemed a forcible felony. Furthermore, the jury was clearly confused by the instructions. During deliberations, the jury sent the judge two notes asking for an explanation of the law, and the verdicts eventually returned acquitted defendant of first degree murder while convicting him of armed violence based on first degree murder.

People v. Taber, 271 Ill.App.3d 576, 648 N.E.2d 342 (4th Dist. 1995) The defendant and the victim were involved in a bar fight; the State claimed that defendant had been the aggressor, while the defendant claimed that he had acted in self-defense. Over defendant's objection, the trial court gave an instruction stating that the State could prove defendant guilty by showing that he knowingly caused bodily harm while on or about a public place of amusement. Defendant argued that the instruction should have contained an additional proposition - "[t]hat the defendant was not justified in using the force that he used." The Appellate Court held that defendant was denied a fair trial by the trial court's failure to include the language tendered by the defense. Since the State had clearly proven both that defendant knowingly caused bodily harm and that he did so while in a public place of amusement, a jury relying on the issues instruction given by the trial court would have convicted defendant without ever considering whether his actions had been justified by self-defense.

People v. Bedoya, 288 Ill.App.3d 226, 681 N.e.2d 19 (1st Dist. 1997) A defendant is not barred from raising self-defense where he claims that a weapon fired accidentally during a struggle in which he was defending himself. Where a weapon is fired accidentally during the course of a "life and death struggle," so "there is evidence of self-defense in addition to evidence of accident, the defendant has the right to rely on an accident theory as to the ultimate injury *and* a self-defense theory as to his preceding acts."

People v. Serrano, 286 Ill.App.3d 485, 676 N.E.2d 1011 (1st Dist. 1997) A defendant may raise a compulsion defense to felony murder where he was compelled to assist in the underlying felony. Although the compulsion defense does not generally apply to murder cases, that general rule evolves "from the rationale that when a person is confronted with a choice of doing two evils, such as his own death or the death of another, [he] ought to sacrifice his own life rather than escape by the murder of an innocent." Where the defendant was justified in participating in a robbery in order to save his life, however, he does not lose the compulsion defense because the person threatening him "unexpectedly kills someone in the course of the robbery and thus converts a mere robbery into a murder." The court held that a compulsion instruction should have been given here. Defendant and another witness testified defendant had been forced at gunpoint to participate in the robbery, and defendant testified that he did not contact police because he had been told his family would be harmed if he did.

Cumulative Digest Case Summaries **§32-8(e)**

People v. Washington, 2012 IL 110283 (No. 110283, 1/20/12)

The question of whether sufficient evidence exists to support the giving of a jury instruction is a

question of law subject to *de novo* review.

Both self-defense and second-degree murder instructions must be given on request when any evidence is presented showing the defendant's subjective belief that the use of force was necessary. Once presented with evidence of an actual belief in the need for the use of force in self-defense, it is for the jury to determine whether the subjective belief existed, and whether it was objectively reasonable or unreasonable. To obtain a jury instruction on second-degree murder, it is not necessary for a defendant to also produce evidence that his subjective belief was unreasonable.

Because the court granted defendant's request for self-defense instructions, it was error to deny his request for second-degree murder instructions.

People v. Burnett, 2016 IL App (1st) 141033 (No. 1-14-1033, 12/30/16)

1. A defendant is legally insane if, at the time of the offense, as a result of a mental disease or defect he lacked a substantial capacity to appreciate the criminality of his conduct. Although a defendant must prove by clear and convincing evidence that he is not guilty by reason of insanity, he needs to present only "some evidence" of insanity to properly raise the defense. The "some evidence" standard is enough evidence which, if believed, would be sufficient for a reasonable jury to find by clear and convincing evidence that defendant is not guilty by reason of insanity.

Therefore, an insanity instruction should be given where sufficient evidence has been presented to support a jury finding of insanity by clear and convincing evidence. Neither psychiatric testimony nor expert opinion is necessary to justify an insanity instruction.

Although not controlling, federal case law construing an insanity statute that is similar to the Illinois statute holds that the trial court must construe the evidence of insanity most favorably to the defendant. Whether the trial court erred by failing to instruct the jury on insanity is determined under the abuse of discretion standard.

2. Here, the trial court abused its discretion by refusing to instruct the jury on insanity. First, the trial court made an error concerning the law where it appeared to believe that sanity could not be an issue where defendant's expert found the defendant fit to stand trial with medication and gave no opinion of sanity. Second, the evidence was sufficient to allow a reasonable jury to find insanity where defendant had a mental illness at the time of the occurrence and made several statements to police which showed confusion and irrational thinking.

Although the State's two experts were believed that defendant was sane at the time of the offense, and defendant's expert gave no opinion on sanity, the reports of all three experts stated that defendant suffered from multiple mental illnesses. Finally, defendant's IQ was within "borderline range of cognitive functioning."

Because the trial court erred by failing to instruct the jury on insanity, defendant's convictions for first degree murder and vehicular hijacking were reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Jennifer Bontrager, Chicago.)

People v. Cacini, 2015 IL App (1st) 130135 (No. 1-13-0135 & 1-13-3166, 12/11/15)

Defendant was convicted, in a jury trial, of attempt first degree murder and aggravated battery. The trial court concluded that the evidence was sufficient to warrant giving self-defense instructions, and gave IPI Criminal 4th No. 24-25.06, which provides the general definition of self-defense. However, the trial judge failed to also give IPI Criminal 4th No. 24-25.06A, which informs the jury as the final proposition in the issues instructions that the State bears the burden of proving beyond a reasonable doubt that defendant lacked justification to use force in self-defense. The Committee Note to IPI Criminal 4th No. 24-25.06 instructs the trial court to give both to give both No. 24-25.06 and No. 24-25.06A when instructing on self-defense.

As a matter of plain error under the second prong of the plain error rule, the Appellate Court reversed and remanded for a new trial.

1. Once the defense properly raises the affirmative defense of self-defense, the State bears the burden

of proving beyond a reasonable doubt that the defendant did not act in self-defense. The jury must be instructed as to the affirmative defense and the State's corresponding burden of proof. IPI Criminal 4th Nos. 24-25.06 and 24-25.06A fulfill this requirement. Supreme Court Rule 451(a) requires the trial court to use the Illinois Pattern Jury Instructions, Criminal, related to a subject when the court determines that the jury should be instructed on the subject.

2. Supreme Court Rule 451(c) provides that if the interests of justice so require, substantial defects in criminal jury instructions are not waived by the failure to make timely objections. The purpose of Rule 451(c) is to permit the correction of grave errors and errors in cases that are so factually close that fundamental fairness requires that the jury be properly instructed. Rule 451(c) is coextensive with the plain-error clause of Illinois Supreme Court Rule 651(a).

Under the plain-error doctrine, "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded" unless the appellant demonstrates plain error. The plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process.

3. Although defense counsel failed to tender IPI Criminal 4th No. 24-25.06A, failed to timely object to the absence of the instruction, and failed to include the issue in his posttrial motion, the Appellate Court concluded that the trial judge's failure to give No. 24-25.06A constituted plain error. The court concluded that the omission of a burden of proof instruction may have caused the jury to believe that defendant had to prove that he acted in self-defense, especially since neither party's closing argument clarified the burden of proof and the State's closing argument could easily have been misinterpreted.

Defendant's convictions for attempt first degree murder and aggravated battery were reversed and the cause remanded for a new trial.

People v. Gibson, 403 Ill.App.3d 942, 934 N.E.2d 611 (2d Dist. 2010)

A defendant is entitled to a jury instruction on necessity if there is even slight evidence to support the defense. Under 720 ILCS 5/7-13, a necessity defense is available if the defendant: (1) was without blame in developing a situation, and (2) reasonably believed that criminal conduct was necessary to avoid a public or private injury greater than the injury resulting from the crime.

The court acknowledged that defendant was blameless in developing the situation which led to armed robbery and aggravated kidnapping charges - defendant thought he was going to help with a moving job, but was later told that there was going to be a robbery. However, the court found that defendant could not have reasonably believed that participation in the crimes was necessary to avoid a greater injury where he failed to take advantage of several opportunities to withdraw from the enterprise, use his cell phone to call 911, or seek help from nearby police officers.

Because there was no basis for the defense, the trial court did not err by refusing to give a necessity instruction.

(Defendant was represented by Assistant Defender Vicki Kouros, Elgin.)

Top

§32-8(f)
Circumstantial Evidence

People v. Bryant, 113 Ill.2d 497, 499 N.E.2d 413 (1986) The Supreme Court held that the second paragraph of IPI 3.02 ("You should not find the defendant guilty unless the facts or circumstances proved exclude every reasonable theory of innocence") should no longer be used.

Top

§32-8(g)
Defendant's Failure Testify

Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981) Where the defendant did not testify, the trial judge violated the Fifth and Fourteenth Amendments by refusing to give defendant's tendered jury instruction that he was "not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way." "[A] state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify."

Lakeside v. Oregon, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978) Neither the privilege against compulsory self-incrimination nor the right to counsel is violated where the trial court, over defense objection, gives an instruction that tells the jury not to draw any adverse inference from the defendant's decision not to testify. The Court rejected the argument that giving the instruction constitutes an unconstitutional interference with defense counsel's trial strategy. See also, **People v. Matney,** 293 Ill.App.3d 139, 686 N.E.2d 1239 (2d Dist. 1997).

People v. Ramirez, 98 Ill.2d 439, 457 N.E.2d 31 (1983) When requested by the defendant, the trial judge is required to instruct the jurors that they are not to consider the defendant's failure to testify.

Top

§32-8(h)
Evidence Admitted for Limited Purpose

People v. Monroe, 66 Ill.2d 317, 362 N.E.2d 295 (1977) When evidence is admitted for a particular purpose and is inadmissible for another purpose, the party against whom it is admitted may tender instructions appropriately limiting the purpose for which it may be considered.

People v. Tate, 30 Ill.2d 400, 197 N.E.2d 26 (1964) Reversible error occurred where the jury was not instructed as to the limited purpose for which impeaching evidence could be used. See also, **People v. Bradford**, 106 Ill.2d 492, 478 N.E.2d 1341 (1985) **People v. Taylor**, 66 Ill.App.3d 907, 384 N.E.2d 558 (3d Dist. 1978).
People v. Criss, 307 Ill.App.3d 888, 719 N.E.2d 776 (1st Dist. 1999) The trial judge erred by failing to give a limiting instruction concerning the use of transcripts of tape-recorded conversations, "It . . . is proper for a trial court to permit the jury to use written transcripts of recorded conversations to assist them while they listen to the conversations, when the transcripts are used solely for this limited purpose and are collected from the jurors after they have listened to the tapes." However, the court should admonish the jury concerning the purpose for which the transcripts are admitted and that it must determine for itself the events allegedly transpiring on the tape.

People v. Richards, 64 Ill.App.3d 472, 381 N.E.2d 307 (4th Dist. 1978) At defendant's trial for a sex offense, the State was allowed to present evidence of prior sexual activity between defendant and complainant to show the "relationship and familiarity of the parties." The jury was then instructed that the evidence of the "other crimes" was received "solely on the issues of design." The Appellate Court held the instruction was erroneous in that it used the term "crimes" when the defendant had been neither charged nor convicted of any

crime. Additionally, the instruction improperly told the jury to consider the prior "instances" in regard to "design," which was not the purpose for which the evidence was admitted.

Cumulative Digest Case Summaries **§32-8(h)**

People v. Fultz, 2012 IL App (2d) 101101 (No. 2-10-1101, 6/11/12)

IPI Criminal 4th No. 3.13 instructs the jury that it can consider a defendant's prior conviction only to assess his credibility as a witness, and not as proof of his guilt. This instruction is to be given only at the request of the defendant.

It was error to give this instruction over the defense objection that it highlighted the defendant's conviction. The court rejected the State's argument that the error was harmless because the instruction was accurate and only served to benefit the defendant. It is the prerogative of the defendant to determine whether such instruction is beneficial to the defendant or unduly accentuates his criminal past.

The error, in conjunction with the restriction on cross-examination of a police officer-complainant regarding bias or motive, was not harmless. The evidence was not overwhelming but presented a credibility contest between the defendant and the police officer. The erroneous rulings related to the heart of that issue. The defendant was not permitted to fully challenge the officer's credibility. The prosecutor relied on the instruction to remind the jury to consider defendant's prior conviction in assessing whether to believe defendant or the officer.

(Defendant was represented by Assistant Defender Paul Rogers, Elgin.)

People v. Johnson, 2013 IL App (2d) 110535 (Nos. 2-11-0535 & 2-11-0782 cons., 5/31/13)

Jury instructions give jurors the correct principles of law applicable to the facts so they can reach a correct conclusion according to the law and the evidence. Where evidence of other crimes is admitted, a precisely-tailored version of Illinois Pattern Jury Instructions, Crim. No. 3.14 is to be given. The preferred practice is for the court to instruct the jury of the limited purpose for which the evidence may be considered, not only at the close of the case, but also when the other-crimes evidence is admitted.

Defendant was tried in a joint trial for UUW by a felon and domestic battery. In addition, the jury heard evidence of two uncharged domestic batteries, as well as threats that accompanied those offenses. At the close of the case, the court instructed the jury that evidence of uncharged conduct could be considered "on the issues of defendant's intent, motive, design, knowledge, absence of mistake, and propensity." When the parties stipulated that defendant had been previously convicted of a felony, which qualified for admission solely to prove an essential element of the charge of UUW by a felon, the court advised the jury that the stipulation "can be used by you like any other evidence in this case to come to your verdict."

These instructions were deficient. At no time during the trial did the court explain to the jury the difference between the charged conduct and the uncharged conduct. As a result, the jury's verdicts may have been based on the uncharged conduct. The court failed to tailor I.P.I. Crim. 4th No. 3.14 based on the evidence presented to make it clear that the jury should not consider the charged domestic battery, the uncharged domestic batteries, or the evidence of defendant's threats, as propensity evidence on the UUW by a felon case, and that the jury could not consider the defendant's felony conviction, the evidence of threats, or the evidence of defendant's gun possession, as propensity evidence in the domestic violence case.

(Defendant was represented by Assistant Defender Yasemin Eken, Elgin.)

Top

§32-8(i)
Lesser Included Offenses

Keeble v. U.S., 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973) A defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury to rationally find him guilty of the lesser offense. If the prosecution has not established every element of the offense charged, and no lesser offense instruction is offered, the jury must return a verdict of acquittal.

Schmuck v. U.S., 489 U.S. 705, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989) The Court adopted the "elements" approach for the giving of lesser included offense instructions under Rule 31(c). Under this test, an offense is lesser included if its elements are a subset of the elements of the charged offense. The Court rejected the "inherent relationship" test.

Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) Statute was held unconstitutional because it prohibited the judge from instructing the jury on a lesser included, non-capital offense which was supported by the evidence.

Hopkins v. Reeves, 524 U.S. 88, 118 S.Ct. 1895, 141 L.Ed.2d 76 (1998) **Beck v. Alabama**, 447 U.S. 625 (1980), which held unconstitutional a State statute prohibiting lesser included offense instructions in capital cases when such instructions are generally given in non-capital cases, applies only where under the law of the jurisdiction in question, the lesser crimes are included offenses in non-capital cases. Where the State Supreme Court has held, in both capital and non-capital cases, that second-degree murder and manslaughter are not lesser included offenses of felony murder, **Beck** does not require that lesser included offense instructions be given.

People v. Novak, 163 Ill.2d 93, 643 N.E.2d 762 (1994) The Court identified three possible theories on which it can be determined whether lesser included offense instructions should be given. The "abstract elements" test is not followed in Illinois because it is too inflexible and unpredictable. The "inherent relationship" test gives the greatest flexibility in conforming the punishment to the crime, but the Court criticized this approach because the lesser offense cannot be identified until all the evidence is in and because the standard is so subjective that it is impossible to formulate governing principles. In Illinois, whether a crime is a lesser included offense is determined by the "charging instrument" test. Under this standard, a crime is a lesser included offense if the charging instrument sets out "the main outline of the lesser offense." The Court found that the "charging instrument" approach best serves the purposes of the lesser included offense doctrine because it creates a broader range of possible lesser included offenses, and thus allows the punishment to conform to the crime. In addition, since the charging instrument is used to decide whether an offense is a lesser included, both parties have notice of all possible lesser included offenses before the trial begins.

People v. Landwer, 166 Ill.2d 475, 655 N.E.2d 848 (1995) Defendant was convicted of solicitation of murder for hire. The Appellate Court reversed the convictions because the trial court refused to instruct the jury on solicitation to commit aggravated battery as a lesser included offense. The Supreme Court reversed the Appellate Court's holding, concluding that a defendant who raises an entrapment defense is not entitled to instructions on a lesser included offense. Defendant was convicted of soliciting the murder of two of his former employees. Defendant claimed that he had only been interested in having the former employees beaten but that a police informant and an undercover officer persuaded him to have them killed instead. Thus, defendant admitted that he had solicited aggravated battery, but claimed that he had been entrapped into solicitation of murder. The Court held that because defendant raised an entrapment defense, he was not entitled to an instruction on solicitation to commit aggravated battery. In most circumstances, a charge alleging solicitation to commit murder will allege the "main outline" of solicitation of aggravated battery. Furthermore, since the offenses involve different states of mind, the evidence will typically permit a conviction of the lesser offense and an acquittal of the greater. The situation changes, however, when the defendant claims entrapment. To raise entrapment, the defendant is required to admit all of the elements of

the charged offense, including intent. Thus, the only disputed issue is whether the defendant was entrapped. Because the issue of intent no longer distinguishes the offenses, there is no longer a rational basis to acquit the defendant of the greater offense while convicting of the lesser. See also, **People v. Cramer**, 85 Ill.2d 92, 421 N.E.2d 189 (1981) (proper to refuse lesser included instruction where the greater and lesser offense each involved the same disputed issue of fact).

People v. Davis, 213 Ill.2d 459, 821 N.E.2d 1154 (2004) Although defendant was originally charged with both knowing and felony murder, at the jury instruction conference the State dismissed the count charging knowing murder. The court concluded that under these circumstances, the trial court properly refused to instruct the jury on involuntary manslaughter, either as a lesser included offense or because such an instruction was supported by the evidence. Involuntary manslaughter is not a lesser included offense of felony murder. Illinois law requires that lesser included offenses be determined under the "charging instrument" test. Under this approach, the court must determine whether: (1) the charging instrument includes the "broad foundation" or main outline of the lesser included offense; and (2) the evidence at trial rationally could support a conviction for the lesser included offense. A lesser included offense instruction is proper only if both questions are answered affirmatively. Because felony murder involves no mental state and involuntary manslaughter requires that the defendant acted recklessly, the court concluded that the felony murder charge here did not set forth the "broad foundation" of involuntary manslaughter.

People v. Hari, 218 Ill.2d 275, 843 N.E.2d 349 (2006) The trial judge erred by refusing to give an involuntary intoxication instruction where the defendant produced evidence that he experienced an unexpected reaction to prescription medication.

People v. Kolton, 219 Ill.2d 353, 848 N.E.2d 950 (2006) A defendant may not be convicted of an uncharged offense, unless it is a lesser included crime and the evidence at trial rationally supports a conviction on the lesser crime and an acquittal of the greater offense. Under Illinois law, whether a crime is a lesser included offense is determined under the "charging instrument" approach, which examines the charging instrument to determine whether the "broad foundation" of the lesser offense is alleged. Under this approach, the absence of a statutory element of the lesser charge will not preclude a finding of a lesser included offense, if the missing element can reasonably be inferred from the charge. Here, aggravated criminal sexual abuse was a lesser included offense of predatory criminal sexual assault of a child. The indictment alleged that defendant committed an act of sexual penetration, without any allegation of defendant's state of mind or motivation. Aggravated criminal sexual abuse requires an act of "sexual conduct," which includes the requirement that the act was committed for purposes of sexual gratification or arousal. Despite the omission of an allegation that the act was performed for purposes of sexual gratification, the court found it reasonable to infer that defendant performed the act of sexual penetration for such a purpose. An act of "sexual penetration" is inherently sexual in nature, and "can be neither unintentional nor inadvertent."

People v. Jones, 149 Ill.2d 288, 595 N.E.2d 1071 (1992) Defendant was tried for armed robbery. The information alleged that he took a car and a purse by pointing a gun and threatening the imminent use of force. The trial judge found insufficient evidence that defendant had threatened the imminent use of force, but convicted him of theft. The Appellate Court reversed on the ground theft is not a lesser included offense of armed robbery but the Supreme Court concluded that the information here impliedly alleged the elements of theft so as to permit a conviction for that offense. By charging that defendant took another's property by threatening to use force, the charge "clearly informed" defendant that he was being charged with obtaining unauthorized control of the property, as required for theft. The charge also "implicitly set out the required mental states" for theft - that defendant knowingly obtained the property of another and intended to permanently deprive the victims of that property. The theft conviction was reinstated.

People v. Arnold, 104 Ill.2d 209, 470 N.E.2d 981 (1984) The trial court did not err, at defendant's trial for murder, by refusing to give a verdict form for "not guilty" of involuntary manslaughter. During closing argument, defense counsel told the jury that defendant was guilty of involuntary manslaughter. "A defendant who admits culpability for a crime cannot expect to have the jury instructed concerning his innocence of the crime." Conviction for murder affirmed.

People v. Perez, 108 Ill.2d 70, 483 N.E.2d 250 (1985) The defendant, a prison inmate, was convicted of the murder of a fellow inmate. Defendant contended that the trial judge erred by refusing to give defendant's tendered instruction on the lesser offense of aggravated battery. The Court stated that "an included-offense instruction is required only in cases where the jury could rationally find the defendant guilty of the lesser offense and not guilty of the greater offense." Here, the jury "could not have rationally found defendant guilty of aggravated battery."

People v. Brocksmith, 162 Ill.2d 224, 642 N.E.2d 1230 (1994) Defendant was charged with theft by deception, a Class 3 felony. At trial, defense counsel successfully tendered a lesser included offense instruction on deceptive practices, a misdemeanor. The jury acquitted defendant of the felony charge but convicted him of deceptive practices. On a consolidated appeal from defendant's conviction and the denial of a post-conviction petition, the Appellate Court held that defense counsel was ineffective because he failed to discover that the statute of limitations on the misdemeanor charge had expired by the time of trial. The Supreme Court failed to reach the issue of ineffectiveness, but held that the conviction must be reversed because defendant was deprived of his right to decide whether to request a lesser included offense instruction.

People v. DiVincenzo, 183 Ill.2d 239, 700 N.E.2d 981 (1998) The primary difference between involuntary manslaughter and first degree murder is the defendant's mental state - involuntary manslaughter occurs when the defendant recklessly performs acts that are likely to cause death or great bodily harm, while first degree murder requires a legally unjustifiable killing by acts which defendant knows are likely to create a strong probability of death or great bodily harm. The court found that there was sufficient evidence of recklessness to entitle defendant to involuntary manslaughter instructions; there was no disparity in size and strength between defendant and the victim, the altercation was of short duration, and three experts testified that the injury causing death was a "rare phenomenon." Furthermore, defendant did not use a weapon and there was a dispute whether he kicked the decedent while the latter was lying on the ground.

People v. Knaff, 196 Ill.2d 460, 752 N.E.2d 1123 (2001) Prohibitions against double jeopardy were not violated when the State proceeded on lesser included offenses after the evidence on the charged offenses was found to be insufficient to withstand a motion for directed verdict.

People v. Garcia, 188 Ill.2d 265, 721 N.E.2d 574 (1999) Under long-standing Illinois precedent, a trial judge has discretion to *sua sponte* instruct the jury on a lesser included offense, even where the State did not charge the lesser offense or request an instruction on it and even over defense objection. A defendant should not be permitted to completely escape justice merely because the prosecutor chose to charge only the greater offense, on which the jury believes that the evidence is insufficient to convict. In addition, a lesser included offense instruction insures that any punishment imposed conforms more closely to the crime actually committed than where the jury's only choices are acquittal or conviction of an offense it believes has not been proven. The court rejected the argument that **People v. Brocksmith**, 162 Ill.2d 224, 642 N.E.2d 1230 (1994) modified Illinois precedent that the trial court may *sua sponte* give a lesser included offense instruction. **Brocksmith** held only that where the defendant and defense counsel disagree, the defendant has the right to decide whether to seek lesser included offense instructions. **Brocksmith** does not preclude the trial court from giving a lesser included offense instruction in response to the State's request, even where the defendant objects. The trial

court may consider the parties' strategies, as reflected by their requests for instructions, and may choose to refrain from giving a lesser included offense instruction that might interfere with defense strategy. However, the court may also, in its discretion, consider "society's interest in punishing the defendant for a crime, no more, no less, than the crime actually committed," and *sua sponte* instruct on a lesser included offense.

People v. Baldwin, 199 Ill.2d 1, 764 N.E.2d 1126 (2002) A defendant can be convicted of an uncharged offense if: (1) that offense is identified by the charging instrument as a lesser included offense, and (2) the evidence adduced at trial rationally supports a conviction on the lesser offense. A lesser offense is alleged by the charge only if it "relate[s] to the greater offense to the extent that the charging instrument describes the lesser" offense. In other words, the charge must set out the "broad foundation" or "main outline" of the lesser offense. A charging instrument need not expressly allege all of the elements of the lesser crime if the missing elements can be inferred from the language of the charging instrument. Aggravated unlawful restraint was not a lesser included offense of home invasion as charged in this case. Neither home invasion count alleged the "broad foundation" or "main outline" of aggravated unlawful restraint, because neither count specifically alleged that defendant used a weapon to detain the complainant.

People v. Hamilton, 179 Ill.2d 319, 688 N.E.2d 1166 (1997) Under the indictment in this case, theft was a lesser included offense of residential burglary. Defendant was charged with residential burglary by knowingly and without authority entering a dwelling place "with the intent to commit therein a theft." The Court concluded that "[b]y alleging in the indictment that defendant entered the . . . dwelling place with the intent to commit a theft, the charging instrument necessarily infers that defendant intended to obtain unauthorized control over and deprive another of property. . . . Moreover, the indictment expressly charged the specific intent to commit theft, which has been deemed sufficient to satisfy the first step of the charging instrument approach. [T]o warrant an instruction on a lesser offense under the charging instrument approach, it is not necessary for the charging instrument to expressly allege all of the elements of the lesser offense." The Court also found that the evidence was sufficient to require an instruction on theft, because there was a reasonable basis on which the jury could have acquitted defendant of residential burglary and convicted him of theft.

People v. Ceja, 204 Ill.2d 332, 789 N.E.2d 1228 (2003) The trial court refused defendant's request to instruct on conspiracy to commit murder as a lesser included offense of first degree murder, finding that conspiracy was not a lesser included offense because the charge did not claim that defendant had "agreed" that another should commit the murder. The Supreme Court affirmed. Whether a crime is a lesser included offense is determined by the "charging instrument" approach, under which the court must first determine whether the charging instrument describes the "broad foundation" or "main outline" of the lesser offense. If so, an instruction on the lesser included offense is proper if the evidence at trial could rationally support a conviction on that offense and an acquittal of the greater offense. Because the indictment charged defendant with first degree murder only as a principal, and contained no reference to any "agreement" that could form the basis of a conspiracy instruction, conspiracy was not a lesser included offense in this case.

People v. Upton, 230 Ill.App.3d 365, 595 N.E.2d 56 (1st Dist. 1992) Defendant was convicted of attempt murder and aggravated battery based on his shooting of a tow truck operator who was repossessing defendant's vehicle because his payments were delinquent. Defendant contended he fired his weapon only to stop what he believed to be a theft of his vehicle. The Court found reversible error because the trial judge refused to give defendant's instructions on reckless conduct. There was sufficient evidence to support the instruction - defendant testified that he saw no commercial identification on the tow truck, the tow truck operator drove off hastily when defendant shouted, defendant was a considerable distance from the car when he fired what he intended as a warning shot, and he fired a second shot at the tires of the truck as he was running and the truck was moving.

In re Matthew M., 335 Ill.App.3d 276, 780 N.E.2d 723 (2d Dist. 2002) An instruction on a lesser included offense is proper where there is some evidence to support it. Very slight evidence supporting a defendant's theory of the case justifies an instruction. The court concluded that the jury should have been instructed on criminal trespass to a residence as a lesser included offense of residential burglary. In his statement, the minor claimed that his only role in the offense was to act as a lookout while another person determined whether a window in the victim's residence was open. There was no evidence that the minor and the principal planned a theft from the residence, and none of the items stolen from the residence were found in the respondent's possession. Finally, the police were uncertain whether defendant or the principal told them where the stolen items had been hidden. Under these circumstances, a jury could reasonably have concluded that the respondent did not know of the principal's intent to commit a theft and at most intended to participate in a criminal trespass.

People v. Toney, 337 Ill.App.3d 122, 785 N.E.2d 138 (1st Dist. 2003) Where the trial court properly found that the evidence supported an instruction on self-defense in a prosecution for "knowing and intentional" murder, the trial court erred by refusing to give a second degree murder instruction.

People v. Bradley, 256 Ill.App.3d 514, 628 N.E.2d 257 (1st Dist. 1993) Defendant was convicted of two counts of aggravated arson. Two expert witnesses testified that the mattress in defendant's bedroom had been ignited with an open flame and that the fire could not have been started accidentally. In her first statement to police, defendant claimed that the fire started when she dropped a cigarette on the mattress during a struggle with her boyfriend. A short time later, the defendant admitted starting the fire with a cigarette lighter because she was angry with her boyfriend. Defendant later gave a written statement admitting that she had deliberately set the fire. Defense counsel tendered an instruction on criminal damage to property as a lesser included offense. The trial court refused to give the instruction because it believed that there was no evidence of recklessness, an essential element of criminal damage to property. The Appellate Court held that the trial judge erred by refusing to instruct the jury on criminal damage to property. Defendant's initial claim (that the fire had been started by a dropped cigarette) was evidence of recklessness, and the jury could have believed the statement though it was recanted during a subsequent interrogation.

People v. Hines, 257 Ill.App.3d 238, 629 N.E.2d 540 (1st Dist. 1993) Defendant was charged with armed violence based on aggravated battery causing great bodily harm, aggravated battery causing great bodily harm and aggravated battery by use of a deadly weapon. He claimed on appeal that the jury instructions were deficient because they allowed him to be convicted of armed violence based not only on great bodily harm aggravated battery, but also on aggravated battery with use of a deadly weapon. (Use of the latter charge as the predicate for armed violence would have violated **People v. Haron**, 85 Ill.2d 261, 422 N.E.2d 627 (1981), which held that the use of a weapon cannot be used both to enhance a misdemeanor to a felony and as the predicate for armed violence.) The Court concluded that the armed violence instructions should have permitted the jury to convict of armed violence only if it found defendant had committed aggravated battery "based on great bodily harm." Where a defendant is charged with two counts of aggravated battery, one of which could be a predicate felony for armed violence and one which could not, the armed violence instructions must limit the jury's consideration to the proper offense.

People v. McDonald, 321 Ill.App.3d 470, 748 N.E.2d 255 (1st Dist. 2001) Plain error occurred where defendant was convicted of aggravated robbery under an indictment which charged only armed robbery. The armed robbery charge did not allege the "main outline" of aggravated robbery where there was no allegation of an essential element - that defendant indicated verbally or by his conduct that he was armed.

People v. Tainter, 304 Ill.App.3d 847, 710 N.E.2d 158 (1st Dist. 1999) The trial court erred by refusing to instruct the jury on the lesser included offense of involuntary manslaughter. Although several factors militated

against an involuntary manslaughter instruction (including the discrepancy in size between the defendant and the decedent, the brutality and duration of the beating and the severity of the decedent's injuries), there was a reasonable basis on which the jury could have returned an involuntary manslaughter verdict. Among the factors relied upon by the court were defendant's testimony suggesting that the beating occurred as part of a jealous rage, the victim's ability to return home after the incident, defendant's decision to use his bare fists rather than a weapon, and defendant's consumption of alcohol at the time of the offense.

People v. DeWeese, 298 Ill.App.3d 4, 698 N.E.2d 554 (1st Dist. 1998) Under **People v. DiLorenzo**, 169 Ill.2d 318, 662 N.E.2d 412 (1996), and **People v. Hamilton**, 179 Ill.2d 319, 688 N.E.2d 1166 (1997), a charge may set forth the "main outline" of a lesser offense without alleging all of its elements, because the missing language may be "implicitly contained" in the charging instrument. An aggravated criminal sexual assault charge alleged the essence of aggravated criminal sexual abuse although it did not expressly assert that defendant's actions were for purposes of sexual gratification - an allegation that defendant touched complainant's vagina by use of force "implicitly connote[d]" that he did so for purposes of sexual gratification or arousal rather than by mistake or inadvertence.

People v. Nunez, 319 Ill.App.3d 949, 745 N.E.2d 639 (1st Dist. 2001) Under **People v. Brocksmith**, 162 Ill.2d 224, 642 N.E.2d 1230 (1994), the decision to seek a jury instruction on a lesser included offense must be made by the defendant rather than by counsel. Similarly, where a defendant is tried at a bench trial on charges for which the statute of limitations has not run, he may be convicted of a lesser included offense on which the statute of limitations has expired only if the decision to submit the lesser included offense, and thereby waive the statute of limitations, is a product of the defendant's informed consent. Where neither defendant nor defense counsel asked the court to consider the lesser included offense, the charge contained no allegation that the statute of limitations had been tolled, and defense counsel's failure to ask the court to consider a lesser offense was part of a "cohesive trial strategy" based on the claim that defendant had not been involved in the offense, defendant should not have been convicted of the lesser included offense.

People v. DePaolo, 317 Ill.App.3d 301, 739 N.E.2d 1027 (2d Dist. 2000) A defendant is not entitled to extensive admonishments by the trial court concerning the right to decide whether to request lesser included offense instructions. The trial judge properly exercised its discretion by admonishing defendant that he had the right to have input into that decision and by calling a recess when defense counsel indicated that he and the defendant had not discussed the matter. The court rejected the argument that where the evidence suggests that lesser included offense instructions are possible, the judge must give admonishments analogous to those required upon entry of a plea.

People v. Richards, 28 Ill.App.3d 505, 328 N.E.2d 692 (5th Dist. 1975) In a prosecution for armed robbery, defendant introduced an inoperative .22 rifle and argued that it was not a "dangerous weapon". The State argued that the defendant's exhibit was not the weapon used in the crime. The trial court allowed a State instruction which, in part, stated: "The type of weapon used is not a material allegation and need not be proved beyond a reasonable doubt." Here the jury was presented with two questions: (1) whether defendant was armed with a weapon, and (2) whether the weapon was dangerous. Because the above instruction erroneously removed the second question from the jury's consideration, the conviction was reversed.

People v. Sibley, 101 Ill.App.3d 953, 428 N.E.2d 1143 (1st Dist. 1981) The defendant was convicted of attempt murder arising out of an incident in which he pointed a shotgun at someone, a struggle ensued and a third party was shot. The trial court refused defendant's request that the jury be instructed on the charge of reckless conduct. The trial judge erred by refusing to instruct on reckless conduct. There was evidence that the defendant handled the gun improperly, which may be reckless conduct, and a defendant is entitled to an instruction on a lesser included offense if there is any evidence fairly tending to bear upon it. See also, **People**

v. Williams, 293 Ill.App.3d 276, 688 N.E.2d 320 (2d Dist. 1997) (reckless conduct instruction should have been given as included offense of aggravated discharge of a firearm).

People v. Smith, 261 Ill.App.3d 117, 633 N.E.2d 69 (4th Dist. 1994) Defendant was convicted of aggravated battery with a firearm and obstruction of justice, and contended that the trial court erred by refusing to instruct the jury on reckless conduct. The theory of the defense was that the victim had shot himself. Defendant gave police several conflicting accounts, although he consistently said that the victim had shot himself. A third member of the group also gave several inconsistent statements, at times claiming that he had been asleep at the time of the incident, at other times saying the victim had shot himself, and at trial testifying that defendant was "playing with the gun" when it fired, causing a bullet to strike the decedent. The trial court refused to instruct on reckless conduct. The Appellate Court held that reckless conduct occurs where one consciously disregards a "substantial and unjustifiable risk that circumstances exist or that a result would follow," and such "disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise." Handling a gun has been recognized to be reckless conduct, and testimony that the shooting was accidental provided a basis on which the defendant could have been convicted. A reckless conduct instruction should have been given.

People v. Willis, 170 Ill.App.3d 638, 524 N.E.2d 1259 (3d Dist. 1988) The defendant was convicted of aggravated battery and resisting a peace officer. The State presented three witnesses, and the defendant presented no evidence. The testimony showed that a public safety officer was called to a campus incident. The officer began escorting defendant and two other students to a security office. As they entered an elevator, defendant shoved the officer and began wrestling with him. The officer was kicked, probably twice. The defendant was finally subdued by the officer and another individual. The officer and another witness admitted that defendant was "wild and flailing about." The other witness testified that when he grabbed defendant in a "full-nelson hold," defendant attempted to escape and kicked the officer. Defendant requested a jury instruction on the offense of reckless conduct, which was refused. The Appellate Court held that it was error to refuse the instruction on reckless conduct, since there was sufficient evidence to create an issue of fact as to whether defendant acted knowingly or recklessly. The Court pointed to the testimony that defendant had been "wild and flailing about" and, "more importantly," to testimony that defendant kicked the officer while trying to escape from a third party's full-nelson hold.

People v. Gramc, 271 Ill.App.3d 282, 647 N.E.2d 1052 (5th Dist. 1995) The Court held that once a jury has been instructed and started its deliberations, the trial court may not tender a lesser included offense instruction even if requested by the defendant. "Once a jury retires to deliberate, the court should not submit new charges and new theories . . ., regardless of which party requests such. If fundamental justice requires the giving of such instructions and verdict forms, it might be better to declare a mistrial, provided that no double jeopardy issues would arise."

Cumulative Digest Case Summaries **§32-8(i)**

People v. Kennebrew, 2013 IL 113998 (No. 113998, 3/21/13)

1. A defendant may be convicted of an uncharged offense only if it is a lesser included crime and the evidence rationally supports a conviction of the lesser crime and an acquittal of the greater offense. There are three methods for determining whether an offense is a lesser included offense. The "abstract elements" test provides that a crime is a lesser included offense if all of its elements are included within the second offense and it contains no elements that are not also part of the second offense. The "evidence at trial" approach examines the evidence adduced at trial to determine whether proof of the greater offense necessarily established the lesser offense. Finally, the "charging instrument" approach holds that one offense is a lesser

included crime of another if the charging instrument contains the "broad foundation" or "main outline" of the lesser offense.

Under the charging instrument test, the charge need not allege every element of the lesser offense so long as any missing element can be reasonably inferred from the allegations of the charge.

2. The charging instrument approach applies when determining whether an uncharged crime is a lesser included offense for purposes of giving a lesser included offense instruction at trial. By contrast, the abstract elements test applies when determining whether one charged crime is a lesser-included-offense of a second charged offense for purposes of double jeopardy or the one act, one crime doctrine.

3. Supreme Court Rule 615(b)(3) authorizes a reviewing court to reduce the degree of the offense of which the defendant was convicted. The court concluded that the charging instrument approach applies when determining whether a crime is a lesser offense for purposes of Rule 615(b)(3). The court noted that no issues had been raised concerning double jeopardy or the one act, one crime doctrine, and found that Illinois has chosen to apply the charging instrument approach for purposes of determining whether an uncharged crime is a lesser included offense.

Although the jury did not consider the lesser offense at trial (because it was not charged or the subject of a State-requested instruction), and it was the Appellate Court which determined that the evidence was sufficient to support the conviction for the lesser offense, the court found that the charging instrument approach should be applied. The essential element differentiating predatory criminal sexual assault of a child and aggravated criminal sexual abuse concerns whether the act was committed for purposes of sexual gratification. The court concluded that such a mental state could be inferred from the allegation of "sexual penetration" in the predatory criminal sexual assault charge. Thus, when the jury deliberated the charged offense, it also deliberated the essence of aggravated criminal sexual abuse. Similarly, because the missing element was implied in the charge, the Appellate Court did not reach an element which the jury never considered.

In addition, the court concluded that defendant was not deprived of notice or an opportunity to defend against the lesser included charge. Not only could the missing element be inferred from the charge, but a defendant is deemed to have notice not only of the charged offense but of lesser included offenses as well.

(Defendant was represented by Assistant Defender Marty Ryan, Springfield.)

People v. McDonald, 2016 IL 118882 (No. 118882, 12/15/16)

1. Noting a conflict in its own authority, the court clarified the standard to be used in determining whether sufficient evidence exists to warrant giving a jury instruction on a lesser included offense. The court found that a lesser included offense instruction should be given where there is evidence in the record which, if believed by the jury, would reduce the crime charged to the lesser offense. The court rejected its precedent stating that a lesser included offense instruction is justified if ***credible*** evidence in the record would support the lesser charge, noting that the trial court is not to weigh the evidence or determine credibility in determining whether a lesser included instruction should be given.

2. The abuse of discretion standard of review is applied when determining whether the trial court erred by failing to give a lesser included offense instruction. The trial court abuses its discretion by failing to give a lesser included offense instruction if there is some evidence which, if believed, would justify a verdict finding that the lesser offense occurred.

3. The court concluded that the trial court did not abuse its discretion by refusing to instruct the jury on involuntary manslaughter. Involuntary manslaughter occurs where a person unintentionally kills an individual without lawful justification if the acts which caused the death were likely to cause death or great bodily harm and were performed recklessly. 720 ILCS 5/9-3(a). A person acts recklessly by consciously disregarding a substantial and unjustifiable risk that circumstances exist or that a result will follow and such disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation. 720 ILCS 5/4-6. The difference between first degree murder and involuntary manslaughter lies in the defendant's mental state.

Because there was a "dearth" of evidence showing recklessness, the trial court did not abuse its discretion by refusing to give an instruction on involuntary manslaughter.

4. Furthermore, the trial court did not abuse its discretion by refusing to instruct the jury on second degree murder based on serious provocation. Serious provocation is defined as conduct sufficient to excite an intense passion in a reasonable person. 720 ILCS 5/9-2(b). Recognized categories of serious provocation include substantial physical injury or physical assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse.

Mutual combat occurs where two parties willingly enter a fight or struggle or where two persons mutually fight on equal terms. Where the evidence showed that on the day of the incident defendant was holding a knife and threatening to kill the decedent, the decedent was unarmed, and defendant suffered only superficial injuries while the decedent suffered three knife wounds, it was not an abuse of discretion for the trial court to find insufficient evidence of serious provocation to warrant an instruction on second degree murder.

Defendant's conviction for first degree murder was affirmed.

(Defendant was represented by Assistant Defender Debra Nall, Chicago.)

People v. Meor, 233 Ill.2d 465, 910 N.E.2d 575 (2009)

The court found that battery was a lesser included offense of criminal sexual abuse as charged here. (See **BATTERY**, §7-1(a)(2)).

(Defendant was represented by Assistant Defender Kathleen Flynn, Chicago.)

People v. Miller, 238 Ill.2d 161, 938 N.E.2d 498 (2010)

Illinois courts have used three methods to determine whether one crime is a lesser included offense of another crime: (1) the "abstract elements" approach, under which the statutory elements of the offenses are compared; (2) the "charging instrument" approach, under which the charging instrument is examined to determine whether the description of the greater offense contains a "broad foundation" or "main outline" of the lesser offense; and (3) the "evidence" or "fact" approach, under which the court looks to the facts adduced at trial to determine whether proof of the greater offense necessarily establishes the lesser offense.

Where the issue is whether the jury should be instructed on an uncharged lesser included offense, the predominant concern is providing notice of the offenses of which a defendant may be convicted. Under these circumstances, the "charging instrument" approach is appropriate.

When determining whether multiple convictions may be entered for closely related acts, however, the defendant has notice of the possible convictions based on the charges. The "abstract elements" approach is more appropriate for these purposes, because it permits defendants to be held accountable for the full measure of their conduct and resulting harm.

Thus, application of the "one act, one crime" doctrine is determined under the "abstract elements" test.

(Defendant was represented by Assistant Defender Deborah Pugh, Chicago.)

People v. Wilmington, 2013 IL 112938 (No. 112938, 2/7/13)

1. Supreme Court Rule 431(b) requires the trial court to question prospective jurors concerning whether they understand and accept several principles, including that the defendant is presumed innocent, that the State must prove guilt beyond a reasonable doubt, that the defendant need not offer any evidence, and that the defendant's failure to testify cannot be held against him. The court's method of inquiry must provide each veniremember with an opportunity to respond to specific questions concerning the four principles.

The trial court admonished the veniremembers concerning the principles, and subsequently asked whether they accepted three of them - the presumption of innocence, the reasonable doubt standard, and the fact that defendant was not required to present evidence. However, the trial court failed to ask whether the jurors understood the above three principles, and failed to ask whether the jury understood or accepted that

they could not hold the defendant's failure to testify against him. However, no objection was raised in the trial court.

The plain error rule allows consideration of errors that were not challenged in the trial court if either: (1) the evidence is so closely balanced that the error threatened to tip the scales of justice against the defendant; or (2) the error was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process. In **People v. Thompson**, 238 Ill.2d 598 (2010), the Supreme Court held that where the second prong of the plain error requirement is involved, the defendant is entitled to relief only if he or she can establish that the violation of Rule 431(b) resulted in a biased jury. Here, defendant argued an issue not reached in **Thompson** – whether the first prong of the plain error rule applied because the evidence was closely balanced.

The court concluded that the evidence was not closely balanced, and that the first prong therefore did not apply. Although the jury sent notes to the judge during deliberations, there was no indication that it had reached an impasse or experienced trouble reaching a verdict. In addition, the testimony of the expert witnesses did not render the case closely balanced.

Furthermore, there was unrebutted evidence that the defendant gave an inculpatory statement that was corroborated by at least some of the physical evidence. The sole inconsistency of any significance between defendant's statement and the physical evidence concerned the clothes worn by the decedent when his body was found. The court concluded that this "lone inconsistency [was not] sufficient to render the evidence in this case closely balanced for purposes of first-prong plain error."

2. Under Illinois law, five decisions ultimately belong to the defendant after consultation with his attorney: (1) what plea to enter, (2) whether to waive a jury trial, (3) whether defendant will testify, (4) whether to appeal, and (5) whether to submit an instruction on a lesser included offense. The latter decision is left to the defendant because electing to submit a lesser included offense instruction exposes the defendant to possible criminal liability which he might otherwise avoid and amounts to a stipulation that the jury could rationally convict of the lesser included offense.

3. The court concluded that the same rationale does not apply where defense counsel requests an instruction on second degree murder. Second degree murder is not a lesser included offense of first degree murder, but rather a lesser-mitigated offense requiring that all of the elements of first degree murder, plus a mitigating factor, have been proved. The court concluded that because the defendant is not exposing himself to potential criminal liability which he might otherwise avoid, he does not have the right to decide whether an instruction on second degree murder should be submitted.

(Defendant was represented by Assistant Defender Brian Koch, Chicago.)

People v. Beasley, 2014 IL App (4th) 120774 (No. 4-12-0774, 4/25/14)

1. A defendant is entitled to a lesser-included offense instruction if the evidence at trial would allow a rational jury to find the defendant guilty of the lesser offense while acquitting him of the greater offense. The basic difference between involuntary manslaughter and first degree murder is the mental state accompanying conduct which resulted in another's death. For first degree murder, the defendant must know that his acts create a strong probability of death or great bodily harm. For involuntary manslaughter, the defendant must recklessly perform acts likely to cause death or great bodily harm.

Standing alone, defendant's testimony that he did not intend to shoot anyone does not provide a sufficient basis for giving an instruction on involuntary manslaughter. However, the court concluded that there was sufficient evidence to support an involuntary manslaughter instruction where a witness testified that defendant did not appear to be pointing the gun at any specific person before it went off, that defendant and the decedent knew each other, and that defendant would not have intentionally shot the decedent. In addition, several witnesses testified that defendant was not pointing the gun at anyone in particular when the shot was fired. The court also noted that there was a basis in the evidence to find that defendant was in a dispute with the decedent and thought the decedent was advancing and threatening to harm him. Finally, defendant testified that the gun went off accidentally and that he had an elevated sense of fear due to previous incidents in which

he had been shot.

The court concluded that although the evidence supporting involuntary manslaughter was not as strong as the evidence supporting second degree murder, a rational jury could have accepted defendant's claim that he acted recklessly and did not intend to shoot the decedent. Therefore, the trial court abused its discretion by failing to instruct the jury on involuntary manslaughter. Defendant's conviction was reversed.

(Defendant was represented by Assistant Defender, Daaron Kimmel, Springfield.)

People v. Blan, 392 Ill.App.3d 453, 913 N.E.2d 23 (2d Dist. 2009)

1. A defendant is entitled to a lesser included offense instruction if the evidence would permit a rational jury to convict of the lesser included offense and acquit of a greater offense. A lesser included instruction is required where there is at least "slight" evidence tending to prove the lesser offense or disprove the greater one.

2. Where defendant was arrested in possession of 31 grams of cannabis, 3.6 grams of which were packaged in four small plastic bags and approximately 28 grams of which were packaged in a single large bag, the trial court erred by refusing defendant's request to give a lesser included offense instruction on possession without intent to deliver. Although the evidence would have allowed a rational jury to find beyond a reasonable doubt that the defendant intended to deliver all of the cannabis, there was at least "very slight" evidence to support the lesser offense where defendant told police that he planned to smoke most of the cannabis, but made up "four nickel bags to sell and make $20."

Although defendant's confession was uncorroborated and self-serving, its uncorroborated nature "does not cause it to cease to be evidence." Furthermore, its self-serving nature "does nothing to distinguish it from the majority of testimony heard in this (or any) case."

3. Rejecting precedent from other districts, the court found that the failure to give a lesser included offense instruction cannot be harmless error. Because the refusal to tender a lesser included offense instruction constitutes error only if there is sufficient evidence to allow a rational jury to convict of the lesser offense and acquit of the greater offense, the court held that the normal harmless error inquiry is inherent in deciding whether error occurred at all. In other words, because the finding of error required a conclusion that a rational juror could have convicted of the lesser included offense, "we cannot deem that error harmless on the ground that no rational jury could have sided with defendant."

Defendant's conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Linda Johnson, Elgin.)

People v. Booker, 2015 IL App (1st) 131872 (No. 1-13-1872, 5/12/15)

Defendant was charged with several offenses including home invasion while armed with a firearm. Following a bench trial, he was convicted of home invasion while armed with a dangerous weapon other than a firearm. In announcing its verdict, the trial court stated that the conflicting evidence failed to establish that the weapon in question was a firearm.

1. The Appellate Court held that defendant was improperly convicted of home invasion while armed with a dangerous weapon other than a firearm. A defendant may not be convicted of an uncharged crime unless it is a lesser-included offense of the charged crime and the evidence at trial rationally supports a conviction for the lesser offense and an acquittal of the greater offense. To determine whether an uncharged crime is a lesser-included offense, the court looks to the allegations in the charging instrument to determine whether the description of the greater offense contains the broad foundation or main outline of the lesser offense.

Noting that the home invasion statute places committing the offense "with a firearm" or "with a dangerous weapon other than a firearm" in different subsections, the court concluded that the former offense necessarily excludes the latter offense. Thus, an allegation that defendant was armed with a dangerous weapon other than a firearm cannot be reasonably inferred from the allegation that he was armed with a firearm.

Because the information charging defendant with home invasion while armed with a firearm did not

state the broad foundation or main outline of home invasion while armed with a dangerous weapon other than a firearm, the latter offense was not a lesser-included offense. The trial therefore erred by convicting defendant of the uncharged offense of home invasion with a dangerous weapon other than a firearm.

2. The court reached the issue as plain error under the second-prong of the plain error rule.

The convictions and sentences for home invasion while armed with a dangerous weapon were reversed and the cause remanded for re-sentencing on the remaining convictions.

People v. Fuller, 2013 IL App (3d) 110391 (No. 3-11-0391, 5/30/13)

1. When multiple charges arise from the same act, the defendant may be convicted and sentenced for the most serious offense. Where multiple charges arise from multiple acts, the court must determine whether any other offenses are lesser included offenses. If so, multiple convictions are improper.

Defendant was convicted of home invasion and criminal sexual assault, and argued that criminal sexual assault was a lesser included offense of home invasion and therefore could not be the subject of a separate conviction.

Illinois courts have identified three methods for determining whether one crime is a lesser included offense of another offense: (1) the "charging instrument" approach, (2) the "abstract elements" approach, and (3) the "facts or evidence adduced at trial" approach. In **People v. Miller**, 238 Ill.2d 161, 938 N.E.2d 498 (2010), the Supreme Court held that the "abstract elements" approach governs whether a charged offense is a lesser included crime of another charged offense.

Under the abstract elements approach, if all of the elements of one offense are included in the second offense, and the first offense contains no element that is not also an element of the second offense, the first offense is a lesser included offense of the second crime. In other words, a crime is a lesser included offense if it is impossible to commit the greater offense without committing the lesser offense.

Home invasion is committed where one: (1) knowingly enters the dwelling place of another with reason to know that persons are present, and (2) intentionally causes injury, uses force or threatens to use force while armed with a dangerous weapon, personally discharges a firearm that causes great bodily harm or death, uses force or threatens to use force while discharging a firearm, or commits any of several specified sex offenses against a person in the dwelling. The court concluded that because it is possible to commit home invasion without necessarily committing criminal sexual assault, criminal sexual assault is not a lesser included offense of home invasion where both offenses are charged. The court added that even if only the sex offense provision of the home invasion statute is considered, home invasion may occur by the commission of sex offenses other than criminal sexual assault. Therefore, where both offenses are charged and the abstract elements test applies, criminal sexual assault is not a lesser included offense of home invasion.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

People v. Higgins, 2016 IL App (3d) 140112 (No. 3-14-0112, 3/24/16)

1. Under **People v. Brocksmith**, 162 Ill. 2d, 224, 642 N.E.2d 1230 (1994), whether to submit a lesser-included offense instruction is one of five decisions which belong exclusively to the defendant and not to defense counsel. In **Brocksmith**, the court recognized that the decision to tender a lesser-included offense instruction is analogous to the decision to plead guilty and may result in a loss of liberty based on an uncharged offense.

2. Where defense counsel tenders a lesser-included defense instruction, the trial court must inquire of defense counsel, in defendant's presence, whether counsel has advised defendant of the potential penalties associated with the lesser-included offense and whether the defendant agrees with the decision to tender the lesser offense. **People v. Medina**, 221 Ill.2d 394, 851 N.E.2d 1220 (2006). Here, the court concluded that the trial court's duty to inquire applies only if defense counsel tenders the lesser-included offense instruction. Where the State requests a lesser-included offense instruction, the trial court need not ensure that defendant agrees with defense counsel's decision to not object to the instruction.

3. The court noted that in this case, the decision to not object to the lesser-included offense instruction

appears to have been a valid and effective trial strategy. On the greater offense, defendant would have been subject to a sentencing range of 15 to 60 years. By not objecting the lesser-included offense instruction tendered by the State, defendant avoided a more serious conviction and received a sentence of 12 years, three years less than minimum sentence he could have received on the greater offense.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Joy Reedy, Chicago.)

People v. Johnson, 2015 IL App (1st) 141216 (No. 1-14-1216, 12/23/15)

1. Whether a crime is a lesser-included offense is determined by the "charging instrument" test, which permits conviction of an uncharged offense if: (1) the instrument charging the greater offense contains the broad foundation or main outline of the lesser offense, and (2) the evidence rationally supports a conviction on the lesser offense. The latter question is to be considered only after it is determined that the uncharged crime is a lesser-included offense.

2. A charge may set forth the broad foundation or main outline of the lesser offense even if it does not contain every element of the lesser offense, so long as the missing element can be reasonably inferred. Here, defendant was charged with armed robbery for knowingly taking currency from the person or presence of the complainant by the use of force or by threatening the imminent use of force while being armed with a firearm. The complainant testified that defendant pointed a firearm at him, but no weapon was recovered and the State did not produce a firearm at trial.

The trial court found that the evidence was insufficient to establish that the item which defendant displayed was a firearm. However, the judge entered a conviction for aggravated robbery. Aggravated robbery occurs when a person commits robbery while indicating verbally or by conduct that he or she is armed with a firearm, even if it is later determined that there was no firearm.

The Appellate Court concluded that the armed robbery charge alleged the broad outline of aggravated robbery. The court found that the allegation that defendant took property "by the use of force or by threatening the imminent use of force" while armed with a firearm provided a basis to reasonably infer that the defendant indicated either verbally or by his actions that he was armed. Thus, aggravated robbery was a lesser included offense of armed robbery.

3. The court concluded, however, that the evidence was insufficient to justify a conviction for aggravated robbery. The only evidence showing that defendant indicated that he was armed was the complainant's testimony that defendant displayed an item which the trial court found not to be a firearm. "The trial court did not find the victim's testimony about a firearm credible enough to conclude that defendant frightened him with a firearm, and thus the evidence was also insufficient for aggravated robbery."

4. The court reached the issue as second-stage plain error, finding that the entry of a conviction on a crime which is not a lesser-included offense violates the fundamental right to notice of the charges and affects the fairness of the trial and the integrity of the judicial process.

Defendant's conviction for aggravated robbery was reduced to simple robbery and the cause was remanded for re-sentencing.

(Defendant was represented by Assistant Defender Maria Harrigan, Chicago.)

People v. Kidd, 2014 IL App (1st) 112854 (No. 1-11-2854, 3/7/14)

Although a defendant cannot generally be convicted of an uncharged offense, in certain circumstances he or she is entitled to have the jury instructed on a lesser-included offense. To determine whether an offense is a lesser-included, the court must decide whether (1) the charging instrument describes the broad foundation or main outline of the lesser offense, and (2) the evidence allows a jury to rationally find defendant guilty of the lesser offense but not guilty of the greater.

1. Defendant was charged with attempted first-degree murder of a police officer and argued on appeal that the jury should have been instructed on the lesser offense of aggravated assault. Attempt murder of a police officer is defined as taking a substantial step toward the commission of murder with the intent to kill

and knowledge that the victim is a police officer. Aggravated assault is defined as knowingly engaging in conduct which places another in reasonable apprehension of a battery while using a deadly weapon or knowing the person is a police officer.

The court found that the jury should have been instructed on aggravated assault. The indictment alleged that defendant committed attempt first-degree murder by pointing a firearm at the officer and pulling the trigger with the intent to commit murder. Defendant testified that she pointed the gun at the officer but did not pull the trigger. If the jury had believed defendant's verison of events, it could have rationally convicted her of aggravated assault but not attempted murder. By pointing the gun at the officer, defendant placed him in reasonable apprehension of being battered. And since defendant did not pull the trigger, the jury could have acquitted her of attempt murder.

2. The court analyzed four prior decisions, two holding that the lesser aggravated assault instruction should have been given, and two holding that it should not, and found that the result here was consistent with all four decisions. In **People v. Ross**, 226 Ill. App. 3d 392, 589 N.E.2d 913 (1st Dist. 1992), the attempt murder indictment charged defendant with "aiming a gun" at the officer and the evidence showed that defendant pointed a gun at the officer but never fired any shots. In **People v. Krueger**, 176 Ill. App. 3d 625, 531 N.E.2d 396 (2d Dist. 1988), the indictment alleged and the evidence showed that defendant fired shots at the victim's house, but did not fire directly at the victim himself. In both cases, as well as the present case, there was evidence that defendant only intended to frighten the victim.

In **People v. Kimball**, 243 Ill. App. 3d 1096, 614 N.E.2d 273 (1st Dist. 1993) and **People v. Jefferson**, 260 Ill. App. 3d 895, 631 N.E.2d 1374 (1st Dist. 1994), by contrast, the indictments alleged and the evidence showed that the defendants fired shots directly at the victims. Under these circumstances, the defendant was not entitled to a lesser instruction on aggravated assault since there was no evidence that defendant only intended to frighten the victim. The court found the present case similar to **Ross** and **Krueger,** and distinguishable from **Kimball** and **Jefferson**, since there was evidence that defendant merely pointed a gun but did not fire at the officer. The court reversed and remanded for a new trial.

(Defendant was represented by Assistant Defender Tom Gonzalez, Chicago.)

People v. Lee, 2015 IL App (1st) 132059 (No. 1-13-2059, 9/24/15)

1. A lesser-included offense is established by proof of the same or less than all the facts required to prove the charged offense, or by proving a less culpable mental state. In deciding whether an uncharged crime is a lesser-included offense, courts use the charging-instrument approach, which looks at the facts alleged in the charge to see whether the description of the charged offense contains a "broad foundation" or "main outline" of the lesser offense. The charge need not explicitly state all of the elements of the lesser offense, so long as any missing elements can be reasonably inferred from the allegations in the charging instrument.

If the charging instrument adequately charges the lesser offense, courts next determine whether there is "some" evidence that would rationally support a conviction for the lesser offense. If such evidence exists, a trial court abuses its discretion by not instructing the jury on the lesser offense.

2. Defendant was convicted of aggravated cruelty to a companion animal under the Humane Care for Animal's Act (Act). 510 ILCS 70/3.02. The indictments alleged that defendant intentionally caused several horses to suffer serious injury or death by failing to provide adequate food, water, shelter, and health care. The evidence showed that the horses were found on defendant's property in deplorable conditions, having been locked in immobile positions for long periods of time with insufficient food and water, and untrimmed hooves (which caused pain and bone deformation). These conditions caused the death of some horses and serious injury to others.

The trial court refused defendant's non-IPI jury instruction on the lesser-included offense of violation of owner's duties. Under the Act, an owner has the duty to provide his animals with: (a) a sufficient quantity of wholesome food and water; (b) adequate shelter and protection from the weather; (c) veterinary care when needed to prevent suffering; and (d) humane care and treatment. 510 ILCS 70/2.06. The Act defines an owner as any person who: (a) has a right of property in an animal; (b) keeps or harbors an animal; (c) has an animal

in his care; or (d) acts as a custodian of an animal. 510 ILCS 70/2.06.

3. The Appellate Court held that defendant was entitled to an instruction on the lesser-included offense. The allegations in the indictments closely tracked the language of the owner's duties' statute and charged that defendant committed the offense of aggravated cruelty by failing to provide many of the items listed in the statute: adequate food, water, shelter and health care. Although the indictments did not specifically allege that defendant was the owner of the animals, this element could have been reasonably inferred. No one has an obligation to feed, water, shelter, or care for an animal unless he is the owner or is otherwise responsible. Accordingly, the indictment adequately charged the lesser offense.

The court also held that the evidence at trial supported the lesser-offense instruction. Nearly all the evidence detailed the gross deprivation of food and water, humane treatment, and veterinary care. And there was ample evidence that defendant owned the property. The evidence of intent was far from overwhelming, allowing a jury to reasonably conclude that defendant did not intend to cause serious harm or death to the horses. The trial court thus erred by refusing defendant's instruction.

Defendant was granted a new trial.

(Defendant was represented by Assistant Defender Deborah Pugh, Chicago.)

People v. Luna, 409 Ill.App.3d 45, 946 N.E.2d 1102 (1st Dist. 2011)

1. An instruction on a lesser offense is justified where there is credible evidence to support the giving of the instruction. Where there is evidentiary support for an instruction, the failure to give the instruction constitutes an abuse of discretion.

The court rejected the State's argument that a defendant who raises self-defense cannot seek an involuntary manslaughter instruction, because raising self-defense admits an intentional killing while involuntary manslaughter requires an unintentional killing by reckless actions that are likely to cause death or great bodily harm. Because Illinois law allows a criminal defendant to raise inconsistent defenses, the inconsistency between the mental states does not preclude either claim.

2. However, a defendant may not seek to reduce a first degree murder conviction to involuntary manslaughter based on a claim that he acted with a subjective intent that is not supported by any evidence other than the defendant's testimony. "Illinois courts have consistently held that when the defendant intends to fire a gun, points it in the general direction of his or her intended victim, and shoots, such conduct is not merely reckless and does not warrant an involuntary-manslaughter instruction, regardless of the defendant's assertion that he or she did not intend to kill anyone." (**People v. Jackson**, 372 Ill.App.3d 605, 874 N.E.2d 123 (4th Dist. 2007)). Because the evidence here unequivocally demonstrated that defendant intended to swing a knife in the decedent's direction, and other than defendant's testimony there was no evidence that he merely intended to scare the decedent, an involuntary manslaughter instruction was not justified.

3. In **People v. Thompson**, 238 Ill.2d 598, 939 N.E.2d 403 (2010), the Supreme Court held that the trial court's failure to comply with Supreme Court Rule 431(b), which requires that the judge ascertain that jurors understand and accept four basic legal principles, satisfies the "fundamental error" prong of the plain error rule only if the defendant shows that the error resulted in a biased jury being impaneled. However, **Thompson** left open the issue whether Rule 431(b) violations could be plain error under the "closely balanced evidence" test.

Here, even if the evidence was closely balanced, defendant could not show prejudice from the trial court's failure to ensure that the venire understood and accepted the principle that no consideration could be given to a defendant's decision not to testify. Because the defendant did testify, the court concluded that he could not carry his burden of persuasion concerning plain error.

(Defendant was represented by Assistant Defender Julianne Johnson, Chicago.)

People v. Richardson, 2011 IL App (4th) 100358 (No. 4-10-0358, 11/29/11)

Generally, any error relating to jury instructions is forfeited if the defendant does not object or proffer alternative instructions at trial. An exception exists for the failure to instruct on the elements of a crime. The

decision whether to instruct the jury on a lesser offense rests with defendant and is one of trial strategy.

Defendant elected to represent himself at trial. Therefore he was responsible for his own representation and was held to the same standards as any attorney. The court had no duty to advise defendant to introduce a lesser-offense instruction *sua sponte* or to inform defendant of the possibility of introducing the jury instruction. Because defendant represented himself at trial, he could not have usurped the decision whether to tender the instruction. Therefore, no error occurred.

(Defendant was represented by Assistant Defender Gary Peterson, Springfield.)

People v. Smith, 402 Ill.App.3d 538, 931 N.E.2d 864 (1st Dist. 2010)

A defendant is entitled to a lesser-included offense instruction if the evidence would permit the jury to rationally find defendant guilty of the lesser offense and acquit him of the greater offense.

Defendant was convicted of attempt murder of a police officer. The State presented evidence that an officer in an unmarked car boxed defendant's car into its parking spot as part of an effort by the police to arrest defendant. Other marked cars came to the scene to assist. An officer stood on the sidewalk in front of defendant's car and identified himself as a police officer. Defendant looked down on the floor of his car, then drove onto the sidewalk, hitting the officer in the side as the officer dove away. Ultimately, defendant crashed into another police car. A gun was found on the floor of defendant's car. Defendant was ticketed for driving on the sidewalk and eluding the police.

The Appellate Court held that this evidence supported defendant's request for an instruction on the lesser-included offense of reckless conduct. The evidence that defendant drove onto the sidewalk and made a decision not to use his gun, coupled with the tickets, could support the inference that he disregarded a substantial and unjustifiable risk to the officer and his disregard of that risk constituted a gross deviation from the standard of care that a reasonable person would exercise while driving a car.

People v. Smith, 2014 IL App (1st) 103436 (No. 1-10-3436, 7/17/14)

1. The trial court did not err by failing to give an involuntary manslaughter instruction at defendant's trial for first-degree murder, attempt first-degree murder, and armed robbery. Defendant testified that he and his former girlfriend struggled over a pistol that the girlfriend was holding, and that the decedent was shot when the gun discharged during the struggle. The Appellate Court found that such testimony, if believed, would not justify an involuntary manslaughter instruction because it would have resulted in an acquittal rather than in any type of conviction.

2. Furthermore, an involuntary manslaughter instruction was not justified based on the complainant's testimony that defendant brought a gun to her home and pointed it at the decedent. Defendant argued that the jury could have believed such testimony and that the decedent was unintentionally shot while defendant and the complainant struggled over the gun.

The court concluded that the totality of the evidence showed that defendant acted intentionally. The decedent's injuries were severe and inflicted by a weapon used by the defendant, and a second person besides the decedent was also wounded. In addition, the fact that three bullets struck two victims "belies defendant's assertion that the gun only went off while he and [the complainant] were struggling." The court also noted that both of the victims were defenseless when defendant burst into their bedroom with a firearm and that defendant tried to break the complainant's phone to keep her from calling for help. Furthermore, defendant stole a car which belonged to the complainant's mother, fled from the scene, and used a pseudonym both at the hospital when seeking treatment for his injuries and when he was arrested.

Because the evidence indicated that defendant acted intentionally or knowingly rather than recklessly, an involuntary manslaughter instruction was not warranted.

(Defendant was represented by Assistant Defender Carolyn Klarquist, Chicago.)

People v. Stewart, 406 Ill.App.3d 518, 940 N.E.2d 273 (1st Dist. 2010)

Although a defendant may not generally be convicted of an offense for which he has not been charged,

in some instances he may be entitled to an instruction on an uncharged lesser-included offense. A lesser-included offense is one that is established by proof of the same or less than all of the facts or a less culpable mental state (or both) than that which is required to establish the commission of the offense charged. 720 ILCS 5/2-9(a). Courts use a two-step charging-instrument approach to determine whether an offense is a lesser-included offense. First, courts look to the charging instrument to determine whether the description of the greater offense contains a broad foundation or main outline of the lesser offense. Once the lesser-included offense is identified, a court must examine the evidence presented at trial to determine whether the evidence rationally supports a conviction for the lesser-included offense. A defendant is entitled to an instruction on the lesser-included offense only if the trial evidence is such that a jury could rationally find defendant guilty of the lesser offense, yet acquit him of the greater.

Under the charging-instrument approach, criminal damage to property is a lesser-included offense of aggravated arson. Defendant was charged with aggravated arson "in that he, in the course of committing arson, knowingly damaged partially or totally any building or structure of Gregory Sloane, located at 5354 South Princeton, in Chicago, Illinois, and [defendant] knew or reasonably should have known that one of more persons were present therein." The criminal damage to property statute provides in relevant part that the offense is committed when a person "recklessly by means of fire or explosive damages property of another." 720 ILCS 5/21-1(1)(b). A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation. 720 ILCS 5/4-6.

Defendant was not entitled to an instruction on the lesser-included offense, however, because the jury could not rationally acquit defendant of aggravated arson and convict him of criminal damage to property. All of the actions of the defendant evidenced knowing and deliberate conduct. There was no evidence that the defendant accidentally caused the fire or that it accidentally spread to the 5354 building.

(Defendant was represented by Assistant Defender Sarah Curry, Chicago.)

People v. Walton, 2013 IL App (3d) 110630 (No. 3-11-0630, 5/29/13)

The charging-instrument approach governs whether a charging instrument has properly charged an uncharged offense. Under this approach, an uncharged offense is considered a lesser-included offense of a charged offense if every element of the uncharged offense is contained in the charging instrument or if any element not listed in the charging instrument can be reasonably inferred from the charging instrument's allegations.

Under the charging-instrument approach, theft under subsection (a)(1) of the theft statute (720 ILCS 5/16-1(a)(1)) is a lesser included of theft under subsection (a)(4) (720 ILCS 5/16-1(a)(4)). Defendant was charged with a violation of subsection (a)(4), which requires that: (1) she obtained control over stolen property; and (2) she either knew that the property was stolen or reasonably should have known that it was stolen. Subsection (a)(1) requires that: (1) defendant obtained or exerted control over property of the owner; and (2) the control was unauthorized. Charging that defendant obtained control over stolen property is included within the element of (a)(1) that defendant obtain or exert control over the property. It can be reasonably inferred from the allegation that defendant obtained the property knowing that it was stolen that the control obtained or exerted by defendant was unauthorized.

Because the State proved that defendant committed all of the elements of the lesser-included offense of subsection (a)(1), the Appellate Court reduced defendant's felony theft conviction under subsection (a)(4) to a felony conviction under subsection (a)(1).

(Defendant was represented by Assistant Deputy Defender Larry Wells, Mt. Vernon.)

People v. Washington, 399 Ill.App.3d 664, 926 N.E.2d 899 (1st Dist. 2010)

Because the jury must determine whether a defendant's belief in the need for self-defense is reasonable or reasonable, a second degree murder instruction is required in a first degree murder case in which a self defense instruction is given. (See **HOMICIDE**, §§26-4(b), 26-7(b)).

People v. Willett, 2015 IL App (4th) 130702 (No. 4-13-0702, 8/4/15)

1. In determining whether the jury should be instructed on an uncharged crime as a lesser included offense, trial courts use the charging instrument approach. Under this approach, an uncharged crime is a lesser included offense if the facts alleged in the charging instrument contain the broad foundation or main outline of the uncharged offense. The indictment need not explicitly assert all of the elements of the lesser offense, so long as any missing element can be reasonably inferred from the charge.

The charging instrument approach includes two steps. First, the court must determine whether the uncharged crime is a lesser included offense. Second, the court must determine whether the evidence is sufficient to uphold a conviction on the lesser offense. If both steps are satisfied, a lesser included offense instruction should be given.

2. The State did not contest that reckless conduct was a lesser included offense of aggravated battery to a child. However, it argued that in determining whether the evidence is sufficient to uphold a conviction for the lesser included offense, the trial court is entitled to make credibility determinations. In addition, the State argued that the trial court's decision whether to give a lesser included offense instruction is entitled to deference.

Acknowledging a conflict in Illinois Supreme Court precedent, the Appellate Court concluded that the trial court may not weigh credibility in determining whether the evidence would rationally support a conviction for the lesser included offense:

> [F]or all practical purposes, the trial court has no flexibility when it comes to determining whether "some evidence" exists that would allow the jury to rationally find the defendant guilty of the lesser offense and not guilty of the greater offense. Either some evidence supports the lesser offense, or none does. If any such evidence exists, a tendered instruction on the lesser-included offense should be submitted to the jury, regardless of the relative weight or credibility of that evidence.

3. The court also concluded that the evidence was sufficient to uphold a conviction for reckless conduct. Therefore, the trial court erred by refusing to give a reckless conduct instruction. Defendant's conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Chan Woo Yoon, Chicago.)

People v. Wrencher, 2015 IL App (4th) 130522 (No. 4-13-0522, 4/30/15)

1. A defendant is entitled to a jury instruction on a lesser-included offense where there is some slight evidence to support the lesser offense and a jury could rationally find the defendant guilty of the lesser offense but acquit him of the greater offense. The Appellate Court held that defendant, who was charged with two counts of aggravated battery of a police officer, was not entitled to a lesser-included jury instruction on the offense of resisting a peace officer. Utilizing the charging instrument approach, the Court found that resisting was a lesser-included offense of the first count of aggravated battery, but that the jury could not have rationally convicted defendant of resisting, but acquitted him of aggravated battery. As to the second count, the Court held that resisting was not a lesser-included offense.

The offense of resisting a peace officer has two elements: (1) the defendant knowingly resisted or obstructed a peace officer in the performance of any authorized act; and (2) the defendant knew the person he resisted or obstructed was a peace officer. 720 ILCS 5/31-1(a). To determine whether resisting was a lesser-included offense of aggravated battery, the Court employed the charging instrument approach. Under this test, the charging instrument need not expressly allege all the elements of the lesser offense. Instead, the elements need only be reasonably inferred from the language of the charging instrument.

2. The first count of aggravated battery alleged that defendant knowing caused bodily harm to the officer by digging his fingernails into the officer's hand, knowing he was a peace officer engaged in the execution of his official duties. 720 ILCS 5/12-4(b)(18). The Court held that the elements of resisting arrest could be reasonably inferred from the language of this count. Although the count did not expressly allege that

defendant resisted or obstructed the officer, causing bodily harm increased the difficulty of the officer's actions, and thereby caused resistence or obstruction.

But the Court found that a rational jury could not have found that defendant's act of causing bodily harm could have constituted resisting but not aggravated battery. By knowingly digging his fingernails into the officer's hand, the only charged act of resistence, defendant necessarily committed aggravated battery. Thus it would have been rationally impossible to convict defendant of resisting but acquit him of aggravated battery.

3. The second count of aggravated battery alleged that defendant knowingly made contact of an insulting or provoking nature by spitting blood on the officer's hand, knowing that he was a peace officer engaged in the execution of his official duties. 720 ILCS 5/12-4(b)(18). The Court held that the elements of resisting arrest could not be reasonably inferred from the language of this count. Spitting is an act of contempt, not an act of resistence or obstruction. It thus did not show that defendant knew he would obstruct the officer by spitting blood. Instead, it only showed that he knew the officer would be disgusted and provoked.

(Defendant was represented by Assistant Defender Rikin Shah, Ottawa.)

Top

§32-8(j)
Witness Credibility; Accomplice Testimony

People v. Armstrong, 183 Ill.2d 130, 700 N.E.2d 960 (1998) While parties must be allowed to cross-examine witnesses about their drug use, a trial court need not instruct the jury that testimony by narcotics addicts is untrustworthy. It is the function of the jury, not the trial court, to determine the credibility of witnesses.

People v. Harris, 182 Ill.2d 114, 695 N.E.2d 447 (1998) The trial court's refusal to give an instruction on the credibility of testimony by an accomplice (IPI Crim. No. 3.17) will be overturned only if there was an abuse of discretion. An accomplice instruction should be given where there is probable cause to believe that the witness was guilty of the offense as a principal or an accomplice. Thus, "an accomplice-witness instruction should be given . . . if the totality of the evidence and the reasonable inferences that can be drawn from the evidence establish probable cause to believe not merely that the person was present and failed to disapprove of the crime, but that he participated in the planning or commission of the crime."

People v. Cobb, 97 Ill.2d 465, 455 N.E.2d 31 (1983) At trial, the key State witness was a person who testified that she drove the defendants to the scene of the armed robbery and murder. The trial court refused to give a defense tendered "accomplice" instruction, since the above witness testified that she had no knowledge of defendants' plans and was not fully aware that defendants committed the crimes until the day after the crimes. It was error to refuse the accomplice instruction because, though the witness denied knowledge of the crimes, there was sufficient evidence to justify her indictment as a principal or an accomplice.

People v. Parks, 65 Ill.2d 132, 357 N.E.2d 487 (1976) The sole evidence linking defendant to the incident came from an "accomplice." Defense counsel objected to the giving of an instruction which states that the testimony of an accomplice witness is subject to suspicion, because he did not want the jury told that the State's witness was an "accomplice." Defense counsel tendered a non-IPI instruction which did not use the term "accomplice." The trial judge refused to give defendant's tendered instruction. Thus, no accomplice testimony instruction was given. The trial judge did not err by failing, *sua sponte*, to instruct the jury concerning the testimony of the "accomplice." The "accomplice" admitted prior inconsistent statements and was sharply cross-examined, and the jury was instructed on its duty to judge the credibility of witnesses and

on the proper consideration of prior inconsistent statements.

People v. Rivera, 166 Ill.2d 279, 652 N.E.2d 30 (1995) The trial court has discretion to give the accomplice witness instruction concerning witnesses for the defense as well as witnesses for the prosecution. The Court overruled several appellate court cases and IPI Committee Comments to the contrary.

People v. Steidl, 142 Ill.2d 13, 566 N.E.2d 1351 (1991) An important State witness admitted that he was a drug addict and had ingested drugs during the month when the murders occurred. The trial court refused to give an instruction which stated that the testimony of a drug addict is of "questionable reliability" and should be "scrutinized with great caution." The Supreme Court stated that refusing to give an addict instruction is not reversible error "where the evidence of the addiction is before the jury so that it can make its own determination of the believability of the witness." Defendant was given wide latitude to cross-examine on the witness's drug use. Under these circumstances, the judge did not abuse his discretion.

People v. Kubat, 94 Ill.2d 437, 447 N.E.2d 247 (1983) The Court rejected the defendant's contention that the trial judge erred by failing, *sua sponte*, to instruct the jury on the possibility of mistaken identification. The trial judge is ordinarily not required to give instructions which are not requested; in addition, instructions on the credibility of witnesses, presumption of innocence and burden of proof adequately protected defendant's right to a fair trial. See also, **People v. Hall**, 134 Ill.App.3d 961, 481 N.E.2d 290 (3d Dist. 1985); **People v. White**, 192 Ill.App.3d 55, 548 N.E.2d 421 (1st Dist. 1989).

People v. Bias, 131 Ill.App.3d 98, 475 N.E.2d 253 (4th Dist. 1985) The trial judge properly refused the defendant's instruction concerning the difficulty of making a reliable identification when the identifying witness is of a different race than the defendant.

People v. David, 141 Ill.App.3d 243, 489 N.E.2d 1124 (2d Dist. 1986) The trial court properly refused defendant's instruction concerning the reliability of a witness who is a drug addict or who used narcotics about the time of the alleged crime. "The mere fact that [the witness] used narcotics at about the time the crime occurred does not require the jury to carefully scrutinize such testimony unless the witness was actually under the influence of the drug at the time of the occurrence to which he testifies."

People v. Krush, 120 Ill.App.3d 614, 458 N.E.2d 650 (2d Dist. 1984) The "total exoneration of a defendant by an accomplice witness called by defendant would preclude giving of the [accomplice witness] instruction." See also, **People v. Szydloski**, 283 Ill.App.3d 274, 669 N.E.2d 712 (3d Dist. 1996) (error to give accomplice instruction where witness claimed she committed offense); **People v. Dodd**, 173 Ill.App.3d 460, 527 N.E.2d 1079 (2d Dist. 1988).

People v. Grabbe, 148 Ill.App.3d 678, 499 N.E.2d 499 (4th Dist. 1986) Defendant was convicted of the murder of his wife based, in critical part, on the testimony of a woman (McCalister) who was dating defendant at the time. McCalister testified that she was present when defendant killed his wife and burned her body. The evidence showed that McCalister had been granted immunity in exchange for her testimony, that she had been charged with the murder but the information was withdrawn, and that she would receive a $20,000 reward if defendant was convicted. The defendant asked that the jury be instructed that each of these matters affected McCalister's credibility and with the IPI accomplice instruction. The Appellate Court held that the trial judge properly refused to instruct the jury that the immunity and reward could affect McCalister's credibility; "[w]e interpret the intent of IPI criminal is to leave comment on such obvious factors affecting credibility as leniency and possibility of reward to argument of counsel and to the general coverage of such matters by the general instruction on the credibility of witnesses." The Court further held, however, that it was error to refuse to instruct the jury that the testimony of an accomplice is subject to suspicion.

People v. Wheeler, 401 Ill.App.3d 304, 929 N.E.2d 99 (3d Dist. 2010)

1. Defense counsel was ineffective for failing to tender I.P.I. Crim. No. 3.17, which instructs the jury that the testimony of an accomplice should be considered with caution. I.P.I. Crim. No. 3.17 should be given if the evidence, and reasonable inferences drawn from the evidence, create probable cause to believe that a witness participated in the commission of a crime. Where the evidence satisfies this standard, the instruction should be given even if the witness denies involvement in the offense.

2. The court concluded that there was sufficient evidence to justify instructing the jury concerning the testimony of an accomplice. Although mere presence at the scene of a crime does not establish that one was an accomplice, the witness testified that he drove the defendant to the crime scene, was present during the offense, and drove defendant from the scene. In addition, after the offense the witness took steps to avoid talking to the police although he knew he was being sought.

3. Although the jury was instructed to consider the witness's interest and bias, the failure to give the I.P.I. accomplice instruction was not harmless error. The evidence was closely balanced, and the State's case relied heavily on the credibility of the accomplice, who was the only witness who could identify defendant's car or place him at the scene. Furthermore, although defendant's cell mate claimed that defendant had admitted the offense, the credibility of that testimony was suspect because the cell mate was promised that in exchange for his testimony, he would receive help in obtaining parole.

Because the result of the trial may well have been different had the jury been instructed that it should closely scrutinize the witness's testimony, counsel's failure to tender the accomplice instruction caused prejudice. The conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Deputy Defender Robert Agostinelli, Ottawa.)

People v. Zambrano, 2016 IL App (3d) 140178 (No. 3-14-0178, 7/20/16)

The jury instruction on the testimony of accomplice witnesses states that when a witness says he was involved in the commission of a crime with defendant, his testimony is "subject to suspicion and should be considered by you with caution." Illinois Pattern Jury Instructions, No. 3.17. This instruction should be given when there is probable cause to believe that the witness, not the defendant, was responsible for the crime as a principle or an accessory under an accountability theory, even where the witness denies being involved in the crime.

Although trial counsel attacked the believability of the witness, he never submitted an accomplice witness instruction. The court held that this failure constituted ineffective assistance.

The evidence showed that the witness was so involved in the offense that, despite his denials, there was probable cause to believe that he acted as an accomplice. Additionally, the State granted the witness use immunity before he testified, further supporting the idea that he acted as an accomplice. Under these circumstances, the court could ascertain no viable strategy for counsel's failure to submit the instruction. The failure to do so constituted deficient performance.

The witness's testimony was detrimental to defendant because it created the inference that defendant was either the shooter or acted in concert with the shooter. His testimony was sufficient by itself to convict defendant. Counsel's failure to submit the instruction prejudiced defendant by depriving the jury of critical information it needed to evaluate the testimony.

The court reversed defendant's conviction and remanded for a new trial.

(Defendant was represented by Assistant Defender Mario Kladis, Chicago.)

Top

§32-8(k)
"Deadlock" Instructions; Inquiries About Reaching a Verdict

Jenkins v. U.S., 380 U.S. 445, 85 S.Ct. 1059, 13 L.Ed.2d 957 (1965) A trial judge may not coerce a verdict. Defendant was entitled to a new trial where, when the jury was unable to reach a verdict after two hours, the judge stated, "[Y]ou have got to reach a decision in this case."

Rogers v. U.S., 422 U.S. 35, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975) Two hours after retiring at petitioner's federal trial, the jury asked the trial judge if he would accept a verdict of guilty (to threatening the life of the President) "with extreme mercy of the Court." The judge, without notifying petitioner or his counsel, responded affirmatively. Five minutes later, the jury returned such a verdict. The Supreme Court held that the trial judge erred by not answering the jury's inquiry in open court and by failing to give petitioner's counsel an opportunity to be heard. The error was not harmless in light of how quickly a verdict was rendered after the response.

People v. Prim, 53 Ill.2d 62, 289 N.E.2d 601 (1972) The Supreme Court held that trial judges faced with deadlocked juries are to comply with the ABA Standards Relating to Jury Trials. The Court also set out the following instruction as being consistent with such Standards:

> "The verdict must represent the considered judgment of each juror. In order to return a verdict it is necessary that each juror agree thereto. Your verdict must be unanimous. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous; but do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict. You are not partisans. You are judges, judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case."

People v. Preston, 76 Ill.2d 274, 391 N.E.2d 359 (1979) The Supreme Court upheld the trial judge's giving of a "deadlock" instruction after the jury had deliberated from 4:25 p.m. to 11:00 p.m. without reaching a verdict. No fixed time can be prescribed concerning how long a jury should be allowed to deliberate before a mistrial is declared; instead, it is the function of the trial court to determine based upon "the length of time spent in deliberation and the complexity of the issues before the jury, when the giving of a supplemental instruction becomes appropriate." Here, the trial was relatively short (two days) with few witnesses (seven), and only one issue was presented (the credibility of a particular State witness). Under the circumstances, giving the "deadlock" instruction was not premature.

People v. Eppinger, 293 Ill.2d 306, 688 N.E.2d 325 (1997) Although it is improper for the trial judge to inquire into the numerical division of the jury, error does not necessarily occur merely because the trial court learns of the division of votes. Whether the error was prejudicial or harmless depends on the particular facts of the case. The error was harmless where the trial court merely inquired as to the vote, but the jury foreman volunteered that the majority favored conviction. In addition, the jury deliberated 45 minutes after the **Prim** instruction was given, making it unlikely that any change in voting was due to the trial court's comments. Accord, **People v. Watkins**, 293 Ill.App.3d 496, 688 N.E.2d 798 (1st Dist. 1997)(trial court did not err by ordering the jury to continue its deliberations after jury notes disclosed that the vote was 10 to 2 in favor of

conviction).

People v. Cowan, 105 Ill.2d 324, 473 N.E.2d 1307 (1985) The defendant was charged with several offenses, and was found guilty of two and not guilty of the others. The jury retired at noon. At 4:14 p.m. the jurors sent a note to the judge saying that they were "totally deadlocked." The judge did not respond. About 7:00 p.m. the jurors sent a note saying they were "completely and hopelessly unable to reach a verdict" and that "further progress is impossible (six votes), unlikely (six votes)." The judge did not respond, but ordered the jury sequestered for the night. The next morning the jury deliberated for 45 minutes, then sent another note: "This jury will never reach a unanimous decision on any of the nine counts." Over defense objection, the judge gave the **Prim** or "deadlock" instruction. The Supreme Court rejected the defendant's contention that giving the deadlock instruction was coercive and improper under these facts.

People v. Dungy, 122 Ill.App.3d 314, 461 N.E.2d 485 (1st Dist. 1984) The jury deliberated for five hours, then retired for the night. The next day, the jury deliberated for seven hours before sending out a note that said, "The jury is firm on their votes, no compromises, no total agreement, hung jury." The judge indicated that whether there was a hung jury was a determination for him and not the jury, and gave the **Prim** instruction. The jury continued deliberations for 40 minutes, and returned a guilty verdict. The Appellate Court held that the trial court did not abuse its discretion. See also, **People v. Thompson**, 93 Ill.App.3d 995, 418 N.E.2d 112 (1st Dist. 1981).

People v. Logston, 196 Ill.App.3d 30, 552 N.E.2d 1266 (4th Dist. 1990) The Court held that the trial judge did not err by refusing to grant a mistrial after the jury said it was deadlocked .After a three-day trial, the jury deliberated nine hours before saying it was deadlocked. After the judge gave a **Prim** instruction, the jury deliberated for six more hours before reaching a verdict - guilty on one count and not guilty on another.

People v. Jackson, 26 Ill.App.3d 618, 325 N.E.2d 450 (1st Dist. 1975) The trial court erred by giving the jury a deadlock instruction after the jury had been deliberating from 11:10 a.m. to 9:20 p.m. When asked if the jury might be able to arrive at a verdict, the foreman replied, "[Y]es, sir, I do." Giving the deadlock instruction was premature since there was no indication that the jury was deadlocked.

People v. Pankey, 58 Ill.App.3d 924, 374 N.E.2d 1114 (4th Dist. 1978) After deliberating for about four hours, the jury informed the court that it was deadlocked. The judge and the attorneys agreed that the jury should be advised to continue and to advise the judge if a verdict could not be reached. Over a defense objection, the court read to the jury "A New Judge's Creed," and concluded by saying "there is no such thing as a hung judge - you will now retire to determine your verdict." The Appellate Court held that the reading of the "Judge's Creed" was improper; it provided no guidance or assistance to the jury, but only added confusion, and was not a proper substitute for a deadlocked jury instruction. In addition, the statement about no such thing as a hung judge was improper and had the effect of "unduly pressuring those in the minority of the jury to 'heed the majority' for the mere purpose of returning a verdict." Reversed and remanded.

People v. Branch, 123 Ill.App.3d 245, 462 N.E.2d 868 (1st Dist. 1984) After the jury had deliberated for more than 24 hours, the foreman sent a note to the judge which stated that the jury had taken several votes and the result was 11 to one for guilty. The note also stated that the "person who has consistently voted not guilty had indicated to us that they could not vote guilty because they do not want anyone to go to jail. Since the beginning they have felt uncomfortable on the jury." Without apprising counsel of the note, the judge called the jury into the courtroom and told the jurors that, based upon the note, the jury was faced with a dilemma and the person indicated in the note "evidently should not have received jury service." The judge then gave the jury a "deadlock" instruction and stated that in "about an hour we will arrange overnight accommodations. The Appellate Court held that the trial judge's remarks were improper. The judge's remarks had the effect

of intimidating the juror into changing his vote by implying that his refusal to defer to the majority position somehow should have disqualified him from jury service." In addition, "the court's remarks concerning the 'impasse that has been caused' and the possibility of overnight sequestration only reinforced that pressure by insinuating that the juror had created a problem, and that if he failed to alter his position within one hour he would be responsible for further inconvenience to himself and his fellow jurors."

People v. Robertson, 92 Ill.App.3d 806, 416 N.E.2d 323 (1st Dist. 1981) The trial judge erred by making the following comments to the jury after giving a **Prim** instruction: "There is no reason at all why this jury cannot arrive at verdicts in this case. I repeat, I don't care what your verdict is, but you can't be deadlocked. You heard one day of evidence and it is a question of you either believe one side or you believe the other. You can't be deadlocked.

People v. Friedman, 144 Ill.App.3d 895, 494 N.E.2d 760 (1st Dist. 1986) The jury retired to deliberate in the late afternoon. At 9:00 p.m., the judge told the jury that "in about half an hour we have to arrange overnight accommodations for you, which we do very often, and then you would be back here tomorrow morning. So in the meantime, that will be in about forty-five minutes probably. So you may return to the jury room." The jury returned with guilty verdicts on all four counts in about five minutes. The Court noted that the jury had deliberated for more than four hours before the judge's remarks, and for only five minutes thereafter. Thus, "it is likely that the [judge's] comment impermissibly hastened the verdict in this case."

People v. Santiago, 108 Ill.App.3d 787, 439 N.E.2d 984 (1st Dist. 1982) The Court held that the actions of the trial judge may have improperly coerced the jurors into returning a verdict of guilty. The judge repeatedly called the jury into open court and asked the numerical division of the jury. The judge then ordered the jury to continue deliberations after learning that the majority of jurors favored a guilty verdict and after the foreman indicated that he did not know whether further deliberations would help. It is improper for the trial judge to inquire into the numerical division of the jury. Furthermore, the judge's actions in this case may have caused the jury to believe "that the court concurred with the majority and that deliberations would continue until a unanimous verdict of guilty was returned." Compare, **People v. Eppinger**, 293 Ill.App.3d 306, 688 N.E.2d 325 (3d Dist. 1997) (error does not necessarily occur merely because the judge learns of the numerical division of votes).

People v. Iozzo, 195 Ill.App.3d 1078, 552 N.E.2d 1308 (2d Dist. 1990) Although it is normally error for the trial judge to inquire into the numerical division of the jury, the trial judge in this case did not err by ordering the jury to continue deliberations after the foreman volunteered the numerical division.

People v. Patten, 105 Ill.App.3d 892, 435 N.E.2d 171 (1st Dist. 1982) The trial court may accept a verdict on less than all of the counts when the jury is deadlocked on the remaining counts. See also, **People v. Jenkins**, 41 Ill.App.3d 392, 354 N.E.2d 139 (1st Dist. 1976).

Cumulative Digest Case Summaries **§32-8(k)**

People v. McCoy, 405 Ill.App.3d 269, 939 N.E.2d 950 (1st Dist. 2010)

The Appellate Court rejected the argument that the trial judge coerced a verdict by informing the jury it would be sequestered, but allowing deliberations to continue when several jurors said they were close to a verdict and would like more time. Whether the trial court's remarks coerced a verdict is reviewed for an abuse of discretion. The test is whether under the totality of the circumstances, the language used by the court actually interfered with the deliberations or coerced a verdict.

Simply informing a jury that it will be sequestered is not necessarily coercive. Similarly, although

extremely brief deliberations after a reference to sequestration may invite an inference that the verdict was coerced, the time between a mention of sequestration and a verdict is not generally a conclusive indication that the jury was coerced.

The court concluded that because a number of the jurors volunteered that they were close to reaching a verdict and requested additional time, and no juror interjected to claim that the jury was deadlocked or was having difficulty, the judge's remarks did not coerce a verdict. Furthermore, the jury had deliberated for several hours, had requested and reviewed the trial testimony of certain witnesses, and determined that defendant was not guilty of one charge.

Defendant's conviction for attempt first degree murder and aggravated battery with a firearm was affirmed.

(Defendant was represented by Assistant Defender Michael Orenstein, Chicago.)

Top

§32-9
Polling of Jury

People v. Kellogg, 77 Ill.2d 524, 397 N.E.2d 835 (1979) The Supreme Court held that the trial judge erred by failing to ascertain whether a juror desired to abide by the verdict; the juror's response ("can I change my vote?") during polling indicated some reluctance. Consequently, the record did not reflect that the verdict was unanimous. Reversed and remanded for a new trial.

The Supreme Court also set out several rules concerning the polling of jurors:

1. When a jury is polled, each juror should be questioned individually concerning whether the announced verdict is his or her own.

2. The polling should be conducted to obtain an unequivocal expression from each juror, free from coercive influences that may have dominated the jury room.

3. The trial judge may use discretion in selecting the specific form of question to be asked, as long as a juror is given the opportunity to dissent — the question "was this then and is this now your verdict" may be used.

4. If a juror indicates some hesitancy or ambivalence in his or her answer, the trial judge has the duty to ascertain the juror's present intent by affording the juror the opportunity to make an unambiguous reply as to his or her state of mind.

5. Because of the great influence of the trial judge on the jury, in posing questions to a juror the court must carefully avoid the possibility of influencing or coercing the juror.

6. If the trial judge determines that a juror dissents from the verdict, the proper remedy is for the trial judge to either direct further deliberations or discharge the jury.

7. The judge's determination is subject to review, and a verdict cannot stand if the interrogation precludes the opportunity to dissent or if the record reflects that a juror has not in fact agreed to the verdict. See also, **People v. Bennett**, 154 Ill.App.3d 469, 507 N.E.2d 95 (1st Dist. 1987).

People v. Williams, 209 Ill.2d 227, 807 N.E.2d 448 (2004) One juror gave counsel an affidavit stating that he had been told by another juror that she "had a conversation" with her husband about the case. The trial court did not err in dismissing a claim of juror misconduct based on the alleged conversation. A jury verdict is not subject to impeachment by a juror's testimony or affidavit which purports to show the "motive, method or process by which the jury reached its verdict." However, juror testimony or affidavits are admissible to show an improper extraneous influence on the jury. The juror's affidavit in this case did not show that any extraneous

influence affected the verdict, but only that an improper conversation may have occurred. Because there was no indication of the nature of the conversation or a showing of prejudice there was no showing of a constitutional deprivation sufficient to require an evidentiary hearing.

People v. McDonald, 168 Ill.2d 420, 660 N.E.2d 832 (1995) When the jury was polled after sentencing defendant to death, the trial court asked each juror whether "was this and is this now your verdict?" One juror answered, "Reluctantly, yes your Honor." On appeal, defendant contended that the juror's response was hesitant and ambiguous, and raised a question about whether he agreed with the verdict. The Court rejected defendant's argument and found the juror's response did not show coercion or possible dissent from the verdict, but merely showed that the juror felt some "reluctance" about passing judgment in a death case.

People v. Hobley, 182 Ill.2d 404, 696 N.E.2d 313 (1998) A jury verdict may not be impeached by a juror's post-trial statements showing the "motive, method or process by which the jury reached its verdict." However, it is proper to admit testimony or affidavits offered to show improper, extraneous influences on the jury. Under Illinois law, prejudice is required before a jury verdict may be set aside because of improper outside influences. To demonstrate such prejudice, jurors may be called to testify about the outside influences. However, testimony concerning the effect of those influences on the jurors' mental processes is inadmissible. It is presumed that the right to a fair trial is prejudiced by "any communication with a juror during trial about a matter pending before the jury." Although the presumption is not conclusive, the State has the burden to establish that the communication did not harm the defendant. Here, posttrial affidavits suggested that statements of non-jurors upset several jurors to the point that one believed her life was in danger. Under these circumstances, defendant made a sufficient showing of prejudice to warrant an evidentiary hearing.

People v. Cabrera, 116 Ill.2d 474, 508 N.E.2d 708 (1987) A statement that a juror makes after the jury has rendered its verdict, been polled and been discharged will not be admitted to impeach the juror's verdict.

People v. Collins, 351 Ill.App.3d 175, 813 N.E.2d 285 (2d Dist. 2004) Generally, a verdict cannot be impeached by evidence of the motives, methods or processes which the jury used to reach its conclusion. However, once the defendant shows that the jury was exposed to outside information relating to an issue in the case and that the verdict may have been influenced, the State has the burden of demonstrating that the verdict was unaffected. A guilty verdict may stand only if it is "obvious" that the defendant was not prejudiced by the extraneous matter. Because a juror admitted that an unauthorized trip to the crime scene aided him in determining guilt, the visit likely affected the foreman's evaluation of the credibility of eyewitnesses, and the crime scene was different at the time of the visit than it had been on the day of the offense, the State failed to carry its burden to show a lack of prejudice from the unauthorized visit.

People v. Smith, 271 Ill.App.3d 763, 649 N.E.2d 71 (2d Dist. 1995) When the jury was polled after returning a verdict each juror was asked, "Was this and is this still your verdict?" When juror Sims responded, "No," the judge asked, "This is not your verdict?" Sims again responded, "No." The court then said, "You did not vote guilty?" Sims responded, "I voted guilty, but it's not what I wanted to do." Defense counsel moved for a mistrial, and the prosecutor asked that the jury be ordered to deliberate further. The court finished polling the jury, and all jurors affirmed the verdict except one who said that it was his verdict "but I'm not happy with it at all." The court then returned the jury to the jury room. After the parties researched the law, the jury was returned to the courtroom. When the judge asked whether the jury had deliberated further, the foreman responded "a little bit" and suggested that the jury be polled again. Defense counsel objected and sought a ruling on his motion for a mistrial, but the trial court again asked Sims whether the guilty verdict "was and still is in fact your verdict?" Sims responded, "Guilty, Your Honor." The trial court then asked the second juror the same question, and was told that the juror's "verdict before" had been guilty but that he "just didn't like the presentation of evidence." The Appellate Court held that the trial court committed reversible error in accepting

the verdict. A jury is polled to ascertain whether any juror has been coerced into agreeing to the verdict. To accomplish this purpose, the trial court must not hinder a juror's expression of dissent, and must consider not only the juror's response but also her demeanor and tone of voice. Where a juror dissents, the only appropriate remedies are to discharge the jury or order further deliberations. When juror Sims indicated dissent, the trial court neither discharged the jury nor ordered further deliberations. In addition, during the second polling the court merely re-examined the two jurors who had made questionable responses, and did not poll the entire jury. Third, juror Sims was not "afforded an opportunity to dissent" during the second polling; the trial judge was obligated to "follow up" on her answers, especially since her demeanor suggested that she might have been coerced into changing her vote.

People v. Beasley, 384 Ill.App.3d 1039, 893 N.E.2d 1032 (4th Dist. 2008) Polling the jury insures that the verdict is the product of free and unhampered deliberations. Polling should be done in a manner that elicits an unequivocal response from each juror. If a juror expresses hesitancy or ambivalence, the trial judge must ascertain the juror's present intent by affording an opportunity to make an unambiguous reply. Whether a juror has freely assented to the verdict is a factual question left to the discretion of the trial court. The trial court erred by failing to question a juror who, when asked whether he agreed with the verdict, responded, "Um - I have to say, yes, I guess," while shaking his head. Because the answer expressed hesitancy or ambivalence, the trial court had a duty to ascertain the juror's present intent by giving him an opportunity to make an unambiguous reply. The failure to make such an inquiry required a new trial. After trial, the juror submitted an affidavit stating that he felt "cut off" by the judge's actions during the polling. In the course of its holding, the court acknowledged that a juror's affidavit cannot be admitted to impeach the verdict. However, the affidavit was admissible to show the juror's reaction to the polling, without regard to whether it would have been admissible to show the process by which the jury came to the guilty verdict.

People v. Wheat, 383 Ill.App.3d 234, 889 N.E.2d 1195 (2d Dist. 2008) The opportunity to poll the jury is a basic right of the criminal justice system. A criminal defendant has an absolute right to request a poll after a verdict is returned and before the jury is discharged. If the jury is not polled despite a timely request, the conviction must be reversed. In determining whether there was a sufficient opportunity to request a poll, the relevant time period is that between when the trial court finishes reading the verdict and when it discharges the jury. After reading the verdict, the trial court must give both parties a reasonable opportunity to poll the jury. The court rejected the State's argument that a two-second pause between the return of the verdict and the discharge of the jury was a reasonable opportunity for the defense to ask that the jury be polled:

> A defendant exercising his right to poll the jury is not a quiz show contest who must anticipatorily press the buzzer before the host is finished asking the question or risk losing points. . . . A defendant is not required to impede on the trial's decorum by interrupting the trial court's reading of the verdict in order to preserve his request to poll.

The court also noted that when defense counsel made a request to poll the jury at the first reasonable opportunity, the trial court denied the request on the ground that the jury had been discharged. However, the judge continued to address the jury for another minute or so. Because the jurors remained in their seats and had not been exposed to any improper matters, the Court concluded that despite the technical "discharge," the trial judge should have granted the request to poll the jury.

People v. Lee, 294 Ill.App.3d 738, 691 N.E.2d 117 (3d Dist. 1998) Affidavits by jurors could not be used in determining whether prejudice occurred from the prosecutor's improper argument. A jury verdict may not be impeached by testimony or affidavit showing the motive, method or process by which the verdict was reached.

People v. Dixon, 409 Ill.App.3d 915, 948 N.E.2d 786 (1st Dist. 2011)

1. Under **People v. Babbington**, 286 Ill.App.3d 724, 676 N.E.2d 1326 (1st Dist. 1997), participation by an alternate juror in jury deliberations constitutes plain error which causes substantial prejudice to the defendant. In **Babbington**, the alternate juror deliberated with the jury, stayed overnight in the same hotel as the sequestered jurors, signed the verdict forms, and responded when the jury was polled.

The court concluded that defendant's post-conviction petition failed to assert the gist of a meritorious issue under **Babbington** because it was not apparent that the alternate juror participated in deliberations. Instead, the record rebutted defendant's claim because the four verdict forms bore only the signatures of the 12 jurors, the alternate jurors had been instructed to remain in the courtroom when the jury retired to deliberate, and the only reason to believe that an alternate juror deliberated was the clerk's erroneous polling of an alternate. The court noted that the clerk apparently realized the mistake and did not complete the polling question, but the alternate juror answered "yes" when asked whether "this [was] your verdict." In view of the verdict forms with 12 signatures, the court concluded that the alternate's answer likely reflected only that he agreed with the verdict reached by the jury and not that he had participated in deliberations.

2. Furthermore, the post-conviction petition did not present the gist of a meritorious issue that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness for failing to peremptorily challenge to excuse a prospective juror who eventually became the jury's foreperson. The trial court had refused to excuse the juror for cause after he failed to mention two 20-year-old arrests when asked about his prior arrest record.

The court concluded that the defendant could not show prejudice because, in light of the overwhelming evidence of guilt, there was no reasonable probability that the defendant would have been acquitted had the foreman not been part of the jury. Because defendant could not show that trial counsel was ineffective, appellate counsel's failure to raise the issue on direct appeal was not error.

The court also noted that the juror's failure to mention two 20-year-old arrests did not indicate any bias where the juror stated during *voir dire* that he could be objective although one of his sons was incarcerated at the time of the trial.

(Defendant was represented by Assistant Defender Rebecca Levy, Chicago.)

People v. McGhee, 2012 IL App (1st) 093404 (No. 1-09-3404, 1/24/12)

A defendant has the absolute right to poll the jury after it returns its verdict. The purpose of polling is to ensure that the verdict is in fact unanimous. Jury-polling errors can occur in three distinct scenarios: 1) where the court does not allow enough time between the return of the verdict and the dismissal of the jury for the defendant to request a poll; 2) where a juror gives some type of ambiguous response during the jury poll; and 3) where the court dismisses the jury without conducting the poll after defendant timely requests a jury poll. Each error requires a slightly different analysis.

Addressing the issue as a matter of first impression, the Appellate Court concluded that no structural error occurs in the third scenario where the jury is not polled despite a timely request. Defendant has a substantive right to a unanimous verdict and a conviction based on a non-unanimous verdict is an error requiring automatic reversal. Polling the jury on request, however, is merely a procedural device to help ensure unanimity, and is not the sole means of ensuring a unanimous verdict. The failure to do so does not affect the fairness of the defendant's trial and challenge the integrity of the judicial process.

Because the trial court's failure to poll the jury on request does not require reversal under the second prong of the plain-error rule, and the Appellate Court had found on direct appeal that the evidence was not closely-balanced, defendant could not carry his burden under either prong of the plain-error rule. Therefore, appellate counsel could not be faulted for failing to raise this non-preserved error on direct appeal.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

People v. Sullivan, 2011 IL App (4th) 100005 (No. 4-10-0005, 9/21/11)

1. In general, a jury verdict may not be impeached by testimony of the jurors. Thus, post-trial juror testimony showing the motive, method, or process by which the jury reached its verdict may not be considered.

An exception is made to this general rule where the testimony concerns improper external influences which were brought to bear on the jurors. Even where jurors testify as to the nature of such outside influences, however, they may not testify about the effect of those influences on the mental processes by which the jury reached a verdict. The trial court's ruling concerning the admissibility of evidence which might impeach the jury's verdict is reviewed for abuse of discretion.

2. The trial court did not abuse its discretion by refusing to consider a juror's post-trial letter stating that several jurors ignored their instructions and treated defendant's failure to testify as evidence of guilt. The allegation did not assert that an improper external influence had been brought to bear on the jurors; instead, the letter went solely to the motive, method and process of the jury's deliberations. The court also noted that the trial court polled the jury after the verdict and that each juror, including two who wrote post-verdict letters criticizing the verdict, unequivocally confirmed their votes of guilty.

(Defendant was represented by Assistant Defender Michael Delcomyn, Springfield.)

Top